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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PETITIONER,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, PETITIONER,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 7800, Civil.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, Plaintiff,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, B. E. ROARK, A. J. MYERS, J. W. CROCKER, M. C. BROWN, CARL F. AHRENS, N. E. DOOLITTLE, M. C. FEATHER and R. E. CARROLL, Defendants.

COMPLAINT—Filed November 19, 1962

1. Plaintiff is a corporation organized under the laws of Delaware with its principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in interstate and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of [fol. 2] plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein an agreement was in effect between plaintiff and defendant covering rates of pay, rules, and working conditions of plaintiff's employees represented by defendant.

3. On or about February 5, 1953, defendant submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of work performed at plaintiff's

North Yard. On January 20, 1960, the Adjustment Board rendered Award 19389 sustaining these claims.

4. On or about March 3, 1953, defendant submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an alleged improper change in freight service between Provo and Eureka, Utah. On December 17, 1959, the Adjustment Board rendered Award 19372 sustaining these claims.

5. Plaintiff refused to comply with Awards 19389 and 19372. The sole remedy of defendant, under the Railway Labor Act, for enforcing Awards 19389 and 19372 was an action in the United States District Court, under Section 3 First (p).

6. On April 12, 1960, defendant notified the National Mediation Board that its members would withdraw from service on the lines of plaintiff, beginning at 2:30 P.M., April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendant postponed its threatened strike during mediation, which continued until May 13, 1960.

7. On May 16, 1960, at 1:30 P.M., defendant notified plaintiff that its members would withdraw from service, beginning at 2:00 P.M. on May 16. The strike commenced as called and continued until eight hours later, when it ceased pursuant to a restraining order entered by this Court.

8. The strike was called by defendant for the purpose of enforcing awards and orders of the National Railroad Adjustment Board, to wit Awards 19389 and 19372 and the orders thereunder. The defendant failed to exhaust the remedies provided by the Railway Labor Act, in particular Section 3 First (p) thereof, prior to calling and engaging in the strike. Defendant thereby violated its duties under the Railway Labor Act.

[fol. 3] 9. The illegal strike called by defendant forced a suspension of plaintiff's operations as a common carrier and caused traffic to be diverted by shippers from the lines of plaintiff, thereby resulting in a loss of revenue. Plaintiff was damaged by the calling and carrying out of defendant's unlawful strike in the amount of $50,000.

10. The jurisdiction of this Court arises under Sections 1331 and 1337 of Title 28 of the United States Code. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

Count II.

1-6. Plaintiff hereby incorporates by reference paragraphs I though 7 of Count I as paragraphs 1 through 7 of Count II.

8. On May 16, 1960, plaintiff was lawfully operating as a common carrier in Colorado and elsewhere. On or about that date, defendant entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier in that defendant wilfully and without excuse caused an illegal strike or concerted work stoppage on plaintiff's railroad lines.

9. Plaintiff hereby incorporates by reference paragraph 9 of Count I as paragraph 9 of Count II.

Wherefore, The Denver and Rio Grande Western Railroad Company prays that it have judgment on Count I of its Complaint or, in the alternative, on Count II of its Complaint against the defendant, Brotherhood of Railroad Trainmen, in the sum of $50,000.

Ray Garrett, William M. McGovern, Jr., T. A. White, Kenneth D. Barrows, Attorneys for Plaintiff.

Sidley, Austin, Burgess & Smith, Of Counsel.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS COMPLAINT OR QUASH THE RETURN OF SERVICE OF SUMMONS—Filed December 26, 1962

Now comes the Brotherhood of Railroad Trainmen, defendant in the above-entitled cause, to move the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure as follows:

1. To dismiss the action on the grounds that it is in the wrong district because (a) the jurisdiction of the Court is invoked under the laws of the United States, and (b) defendant is an unincorporated organization whose headquarters are located in Cleveland, Ohio, and is an inhabitant thereof;

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds that the defendant has not been properly served with process under Rule 4(d)(3) of the Federal Rules of Civil Procedure.

There is attached to this motion the affidavit of Mr. William E. B. Chase, Acting General Secretary and Treasurer of the Brotherhood of Railroad Trainmen.

There is also attached a memorandum of points and authorities supporting the motion.

Respectfully submitted,

Philip Hornbein, Jr., Wayland K. Sullivan, General Counsel, Brotherhood of Railroad Trainmen, James L. Highsaw, Jr., Attorneys for the Defendant, Brotherhood of Railroad Trainmen.

December 24, 1962

AFFIDAVIT IN SUPPORT OF MOTION

State of Ohio,
Cuyahoga County, ss.:

Now comes William E. B. Chase, who first being duly sworn, deposes and respectfully says as follows:

That he is the duly elected, qualified and acting General Secretary and Treasurer of the Brotherhood of Railroad [fol. 5] Trainmen; that he has his office at 1370 Ontario Street, Cleveland, Ohio; and that the statements hereinafter made are asserted of his own knowledge and belief.

That the headquarters of the Brotherhood of Railroad Trainmen are at 1370 Ontario Street, Cleveland, Ohio; and that said Brotherhood does not maintain any office in Denver, Colorado. The location of the headquarters of the Brotherhood in Cleveland, Ohio, is provided for in Section 3 of the Constitution.

That Mr. R. E. Carroll is the Chairman of the General Grievance Committee on the Denver & Rio Grande Western Railroad Company in Denver, Colorado. Said Chairman Carroll is elected to said office by the Chairmen of the local grievance committees of various local lodges having members employed on the Denver & Rio Grande Western Railroad Company. He is not an officer of the Brotherhood of Railroad Trainmen; is not a general or managing agent of said Brotherhood; and is not an agent of the Brotherhood of Railroad Trainmen for service of process or otherwise.

That the Constitution and General Rules of the Brotherhood of Railroad Trainmen provide for the election of General Chairmen by the Chairmen of the local grievance committees of the local lodges on said railroad. The following provisions of said General Rules apply to said election and read, in pertinent part, as follows:

"Local Grievance Committees.

"No. 1 (a). All subordinate lodges shall elect local grievance committees for each division or system repre-

sented in the lodge by five or more members, said committees to consist of three, namely, chairman, vice chairman and secretary, to be elected from among and by the members in actual train, yard or bus service on the division or system which the committee is to represent. * * *"

General Rule 2 reads, in pertinent part, as follows:

"General Grievance Committee—Elections.

"No. 2 (a). On any line or system of railroad or bus company there shall be a general grievance committee formed in the month of January following the quadrennial election of local grievance committees for that line and must consist of the chairmen of the local grievance committees on that line of road, * * *." Etc.

[fol. 6] The election of the officers of a General Grievance Committee is provided for in General Rule 2 (b) which reads, in pertinent part, as follows:

"(b). The officers of a general grievance committee shall be elected on the final day of the quadrennial formation, * * and shall consist of a chairman, vice chairman, and secretary, * *." Etc.

General Chairman Carroll's salary is paid out of funds which are contributed by the members of the local lodges represented by his Committee and confined to the lodges having members employed locally on the Denver & Rio Grande Western Railroad Company.

Further affiant sayeth not.

William E. B. Chase.

Sworn to before me and subscribed to in my presence this 17th day of December, 1962.

Roy H. Neville, Notary Public—State of Ohio.

My commission has no expiration date. Section 147.03 R.C.

(Seal)

Filed December 26, 1962.

IN THE UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed January 21, 1963

Plaintiff hereby amends its complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and complains against the defendants as follows:

Count I.

1. Plaintiff is a corporation organized under the laws of the State of Delaware with its principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in interstate and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein an agreement was in effect between plaintiff and defendant Brotherhood covering rates of pay, rules, working conditions of plaintiff's employees represented by said defendant.

[fol. 7] The defendant Brotherhood of Railroad Trainmen has an office and carries on business in Denver, Colorado. The defendant Brotherhood consists of a Grand Lodge and several subordinate Local Lodges. Defendants, B. E. Roark, A. J. Myers, J. W. Crocker, Carl F. Ahrens, N. E. Doolittle, M. C. Feather and M. C. Brown are all Local Chairmen of Local Lodges of the defendant Brotherhood. Defendant R. E. Carroll is a General Chairman of the defendant Brotherhood. They all reside within this district and act for the Brotherhood in matters of grievance adjustments on the plaintiff railroad.

4. The members of the defendant Brotherhood employed by plaintiff constitute a class so numerous as to make it impracticable to bring them all before this Court. The in-

dividual defendants named herein fairly and adequately represent said class.

5. On or about February 15, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of work performed at plaintiff's North Yard. On January 20, 1960, the Adjustment Board rendered Award 19389 sustaining these claims.

6. On or about March 3, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an alleged improper change in freight service between Provo and Eureka, Utah. On December 17, 1959, the Adjustment Board rendered Award 19372 sustaining these claims.

7. Plaintiff refused to comply with Awards 19389 and 19372. The sole remedy of defendants under the Railway Labor Act for enforcing Awards 19389 and 19372 was an action in the United States District Court, under Section 3 First (p).

8. On April 12, 1960 defendants notified the National Mediation Board that their members would withdraw from service on the lines of plaintiff, beginning at 2:30 P.M., April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendants postponed their threatened strike during the mediation, which continued until May 13, 1960.

9. On May 16, 1960, at 1:30 P.M. defendants notified plaintiff that their members would withdraw from service, beginning at 2:00 P.M. on May 16. The strike commenced as called and continued until eight hours later when it ceased pursuant to a restraining order entered by this Court.

[fol. 8] 10. The strike was called by defendants for the purpose of enforcing awards and orders of the National Railroad Adjustment Board, to-wit: Awards 19389 and 19372 and the orders thereunder. Defendants failed to exhaust the remedies provided by the Railway Labor Act, in particular, Section 3 First (p) thereof, prior to calling and engaging in the strike. Defendants thereby violated its duties under the Railway Labor Act.

11. The illegal strike called by defendants forced a suspension of plaintiff's operations as a common carrier and caused traffic to be diverted by shippers from the lines of plaintiff, thereby resulting in a loss of revenue. Plaintiff was damaged by the calling and carrying out of defendants' unlawful strike in the amount of $50,000.

12. The jurisdiction of this Court arises under Sections 1331 and 1337 of Title 28 of the United States Code. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

Count II

1-9. Plaintiff herein incorporates by reference paragraphs 1 through 9 of Count I as paragraphs 1 through 9 of Count II.

10. On May 16, 1960, plaintiff was lawfully operating as a common carrier in Colorado and elsewhere. On or about that date, defendants entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier in that defendants wilfully and without excuse caused an illegal strike or concerted work stoppage on plaintiff's railroad lines.

11. Plaintiff hereby incorporates by reference paragraph 11 of Count I, as paragraph 11 of Count II.

Wherefore, The Denver and Rio Grande Western Railroad Company prays that it have judgment on Count I of its Complaint, or, in the alternative, on Count II of its Complaint against the defendants herein, in the sum of $50,000.00.

Ray Garrett, T. A. White, William M. McGovern, Jr., Kenneth D. Barrows, Attorneys For Plaintiff.

Sidley, Austin, Burgess & Smith.

[fol. 9]

IN THE UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO STRIKE OR DISMISS AMENDED COMPLAINT—Filed March 1, 1963

Now come the defendants in the above-entitled cause and move the Court as follows:

1. To strike the amended complaint on the ground that the amendment adds new parties defendants and that under Rule 21 of the Federal Rules of Civil Procedure such an amendment may not be made by the plaintiff except on order of the Court in response to a motion by plaintiff;

2. To dismiss the amended complaint as to the individually named defendants pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that officers, agents, or members of a labor organization may not be named as defendants in a suit for damages based on an alleged illegal strike;

3. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground of improper venue;

4. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it fails to set forth a valid class action as a basis for a class suit against the Brotherhood;

5. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it shows on its face that the claim set forth therein is barred by the applicable Colorado statute of limitations; and

6. To dismiss the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that it fails to set forth a claim upon which the relief prayed for can be granted.

There is attached to this motion a supporting memorandum of points and authorities.

Respectfully submitted,

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for Defendants.

March 1, 1963

[fol. 10] AFFIDAVIT OF R. E. CARROLL

R. E. Carroll, of lawful age, being first duly sworn upon his oath deposes and says:

1. Affiant is one of the above named defendants and is chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver and Rio Grande Western Railroad system.

2. The plaintiff employs numerous members of the defendant Brotherhood of Railroad Trainmen who reside in the State of Utah and whose regular work is not ordinarily under the jurisdiction of any local lodge of the Brotherhood of Railroad Trainmen in Colorado. The aforesaid employees are represented in their relationship and dealings with the plaintiff by the chairmen of their own local lodges in the State of Utah.

3. The defendants Roark, Myers, Crocker, Ahrens, Doolittle and Feather, who are chairmen of local lodges

in the State of Colorado, do not represent the aforesaid employees in any matters concerning work under the jurisdiction of the local lodges in the State of Utah.

4. Some of the plaintiff's employees who work in Utah are represented by the defendant Brown. Other of plaintiff's employees who work in Utah are represented by one, Herman Gall, a resident of the State of Utah.

5. Further affiant sayeth not.

R. E. Carroll.

State of Colorado, City and County of Denver; ss.; Subscribed and sworn to before me this 29th day of April, 1963, by R. E. Carroll.

My commission expires January 6, 1965.

Alberta C. Walters, Notary Public.

(Seal)

Filed April 30, 1963.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT

ORDER ON MOTIONS—Entered August 30, 1963

This cause came on the motions and the briefs of the respective parties, and after due consideration, it is Ordered As Follows:

1. That the Plaintiff is granted leave to add the individual defendants as parties defendant to this action.

2. That the defendants' Motion to Strike or Dismiss the Amended Complaint be overruled.

Dated at Denver, Colorado this 29th day of August, 1963.

By The Court: Orie L. Phillips, Circuit Judge Assigned.

In the United States District Court

Answer to Amended Complaint—Filed September 20, 1963

Come Now the defendants and answer the amended complaint as follows:

First Defense: The allegations of the amended complaint do not state a claim on which relief can be granted.

Second Defense: Venue does not lie in this judicial district for action against the defendant Brotherhood of Railroad Trainmen.

Third Defense: This action is barred by the applicable provisions of the Colorado Statute of Limitations.

Fourth Defense: The court has no jurisdiction over the subject matter of Count II of the amended complaint.

Fifth Defense: As a fifth and further defense, defendants admit, deny and allege as follows:

As to the allegations of Count I:

1. Defendants admit the allegations of paragraph 1 of Count I of the amended complaint.

[fol. 12] 2. Defendants admit the allegations of the first and third sentences of paragraph 2 of Count I of the amended complaint. Defendants aver that the second sentence of such paragraph constitutes a legal conclusion which they are not required to answer. To the extent that an answer may be required, defendants deny the allegation in such sentence.

3. Defendants deny the allegations of paragraph 3 of Count I of the amended complaint.

4. Defendants admit the allegation[s] of the first sentence of paragraph 4 of Count I of the amended complaint. Defendants deny the allegations of the second sentence of such paragraph.

5. Defendants admit that on or about February 15, 1953, the Brotherhood of Railroad Trainmen submitted to the First Division of the National Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act the claims described in Award 19389 and that such claims were sustained by that award. Except to the extent thus specifically submitted, defendants deny the allegations of paragraph 5 of Count I of the amended complaint.

6. Defendants admit that on or about March 3, 1953, the Brotherhood of Railroad Trainmen submitted to the First Division of the National Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act the claims described in Award 19372 and that such claims were sustained by that award. Except to the extent thus specifically admitted, defendants deny the allegations of paragraph 6 of Count I of the amended complaint.

7. Defendants admit the allegations of the first sentence of paragraph 7 of Count I of the amended complaint. Defendants aver that the allegations of the second sentence of such paragraph constitute legal conclusions of the plaintiff which defendants are not required to answer.

8. Defendants deny the allegations of paragraph 8 of Count I of the amended complaint.

9. Defendants deny the allegations of paragraph 9 of Count I of the amended complaint.

10. Defendants aver that the allegations of paragraph 10 of Count I of the amended complaint constitute legal [fol. 13] conclusions which defendants are not required to answer. To the extent that an answer may be required to the allegations of such paragraph they are denied.

11. Defendants deny the allegations of paragraph 11 of Count I of the amended complaint.

12. Defendants deny the allegations of paragraph 12 of Count I of the amended complaint.

As to the allegations of Count II:

1-9. Defendants incorporate by reference their answers to paragraphs 1 through 9 of Count I of the amended complaint as answers to these paragraphs as realleged by plaintiff as paragraphs 1 through 9 of Count II of the amended complaint.

10. Defendants admit the allegations of the first sentence of paragraph 10 of Count II of the amended complaint. Except to the extent thus specifically admitted, defendants deny the allegations of such paragraph.

11. Defendants deny the allegations of paragraph 11 of Count II of the amended complaint.

Wherefore, defendants pray that judgment be granted defendants on the amended complaint.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Defendants.

IN THE UNITED STATES DISTRICT COURT

INTERROGATORIES TO BE ANSWERED BY PLAINTIFF—
Filed November 29, 1963

The defendants in the above-entitled action require the plaintiff to answer fully in writing, under oath, pursuant to Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. Name the specific defendant who notified plaintiff that members of the Brotherhood of Railroad Trainmen would withdraw from the service of plaintiff Railroad beginning at 2:00 p.m. on May 16, 1960, as alleged in paragraph 9 of Count I of the Amended Complaint.

[fol. 14] 2. State whether such notification was made orally or in writing.

3. If the notification was made orally, give the name of any witnesses thereto.

4. List the name or names of the officials of the plaintiff to whom such notification was given.

5. List the exact time, as far as possible, that the strike ended.

6. List by number or other appropriate identification passenger trains of the plaintiff which were scheduled to operate between 2:00 p.m. and 10:00 p.m. on May 16, 1960.

7. State which of said trains did not in fact operate because of the strike alleged in the Complaint.

8. Set forth the amount of gross revenue which plaintiff claims was lost as a result of the trains listed in response to question 7 not operating.

9. Furnish a breakdown as to the amount given in response to question 8 as between: (a) Passenger revenue; (b) Mail revenue; (c) Express revenue; (d) Other revenues (identify).

10. State how the amounts set forth in response to questions 8 and 9 were calculated.

11. Set forth the cost to plaintiff of operating the trains listed in response to question 7 if such trains had operated according to schedule.

12. List by number or other appropriate identification freight trains of the plaintiff which were scheduled to operate between 2:00 p.m. and 10:00 p.m. on May 16, 1960.

13. State which of said trains did not in fact operate because of the strike alleged in the Complaint.

14. Set forth the amount of gross revenue which plaintiff claims was lost as a result of the trains listed in response to question 13 not operating.

[fol. 15] 15. State how the amounts set forth in response to question 14 were calculated.

16. Set forth the cost to plaintiff of operating the trains listed in response to question 13 if such trains had operated according to schedule.

17. Give approximately the total number of employees of plaintiff on May 16, 1960.

18. State how many of the employees listed in response to question 17 above were not paid for the period of the strike alleged in the Complaint.

19. State the approximate amount, if any, of wages and salaries of employees of the plaintiff that was not paid because of the strike of employees alleged in the Complaint.

20. Set forth the approximate amount of total loss, if any, which plaintiff claims resulted from the strike alleged in the Complaint not covered by questions 8 and 14 above.

21. Furnish a breakdown of the amount given in response to question 20 by type of loss.

22. Set forth how the amount or amounts furnished in response to questions 20 and 21 were calculated.

23. Furnish the names of officers of the plaintiff Railroad who are familiar with the facts alleged in the Complaint.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for Defendant.

November 27, 1963.

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES—
Filed February 14, 1964

Comes now the plaintiff and in answer to defendants' Interrogatories states and alleges:

1. Messrs. Carroll and McDonald.

2. Said notification was in writing, a copy of which is plaintiff's Exhibit No. 2.

3. No answer.

[fol. 16] 4. L. H. Hale, Vice President.

5. The strike ended at various times over the plaintiff's system. The pickets were removed in Denver at approximately 8:30 P.M., May 16, 1960; and in Salt Lake City and vicinity at approximately 10:30 P.M., on May 16, 1960.

6. Passenger Trains No. 7 and 8, 17 and 18 and 3 were scheduled to operate between 2 P.M. and 10 P.M. on May 16, 1960.

7. All passenger trains operated on May 16, 1960, but all were delayed.

8. No answer.

9. No answer.

10. No answer.

11. No answer.

12. All freight trains scheduled to depart stations between 2 P.M. and 10 P.M. on May 16, 1960 were operated after the strike terminated.

13. All trains operated but were late.

14. No answer.

15. No answer.

16. No answer.

17. Approximately 4,500 employees.

18. The plaintiff does not have any record showing how many of its employees were not paid for the period of the strike. It is the plaintiff's belief that all employees that desired to, worked on the day of the strike.

19. The plaintiff has no record of the information called for in this interrogatory.

20. See attached Exhibit "A".

21. See attached Exhibit "A".

22. See attached Exhibit "A".

23. All officers of the plaintiff Railroad Company were familiar with the strike when it occurred. These include: Mr. L. H. Hale, then Vice President; Mr. R. K. Bradford, Vice President; Mr. E. B. Herdman, Director of Personnel; Mr. T. A. White, General Attorney; Mr. Harold Burnaugh, Asst. to Vice President Bradford.

Kenneth D. Barrows, Attorney for Plaintiff.

Affidavit

State of Colorado,
City and County of Denver, ss.:

I, Kenneth D. Barrows, being duly sworn depose and say that I am an Assistant General Attorney of The Den- [fol. 17] ver and Rio Grande Western Railroad Company; and that the answers to the above interrogatories were obtained by me through my own investigation in various departments of the plaintiff Railroad Company. The answers are true to the best of my knowledge and belief.

Kenneth D. Barrows.

Subscribed and sworn to before me this 27th day of January, 1964.

Helen R. Broderick, Notary Public.

(Seal)

My commission expires June 12, 1966.

Filed February 14, 1964.

EXHIBIT "A" TO ANSWER TO INTERROGATORIES

Estimated Loss Of Revenue Sustained By The Denver And Rio Grande Western Railroad Company Resulting From Brotherhood Of Railroad Trainmen Strike

Ford Motor Company—	
May 19, 1960 to June 4, 1960, auto parts diverted. D&RGW gross revenue	$ 27,091
May 19, 1960 to May 27, 1960, Piggyback movement of automobiles to Salt Lake City diverted. 178 cars @ $558 per car	99,324
May 19, 1960 to May 27, 1960, Piggyback movement of automobiles from Milpitas to Dallas, Houston and Kansas City diverted 21 cars @ $187 17 cars @ 225 38 cars	7,752
Gross Revenue loss from Ford Motor Company	$134,167
General Electric—Louisville to General Electric, Salt Lake—2 cars @ $331	662
Kennecott Copper—Garfield, Utah to Baltimore 10 cars @ $223	2,453
[fol. 18]	
Ruberoid—Denver—roofing to Salt Lake 2 cars @ $511	$ 1,022
Chicago Bridge & Iron—Salt Lake Steel from Chicago area 8 cars @ $598	4,784
Commercial Shearing & Stamping—Salt Lake Steel from Chicago area 6 cars @ $598	3,588

Welch Planing Mill—Midvale			
Lumber to Wisconsin points			
3 cars @ $310			930
			$147,606

	1960		
M of W	10.44		
M of E	15.09		
Trans	32.14		
	57.67—42.33%	Net	$ 62,482
Total	66.24		

IN THE UNITED STATES DISTRICT COURT

MOTION TO AMEND ANSWER—Filed December 17, 1963

Come Now the defendants and move for leave to amend their Answer by adding thereto a sixth defense, reading as follows:

"Sixth Defense: "As a sixth and further defense, defendants allege that the plaintiff failed to take reasonable measures to prevent or mitigate its alleged damage, and that any damage which the plaintiff may have sustained is the result of the plaintiff's failure to take such action."

James L. Highsaw, Philip Hornbein, Jr., Attorneys for Defendants.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' PRE-TRIAL STATEMENT—
Filed December 17, 1963

1. Defendants rely on all defenses set forth in their answer to the amended complaint.

2. The defendants contend that the plaintiff failed to take reasonable measures to mitigate its alleged damage.

3. Defendants generally deny that any damages were sustained by the plaintiff as a result of any acts of defendants.

4. Defendants deny that they can be held liable for the failure on the part of the plaintiff's customers to utilize the plaintiff's services unless such failure was directly instigated by the defendants.

5. Defendants contend that they cannot be held liable for actions taken by third persons, over whom they have no control, by reason of a notice sent to the National Mediation Board.

6. In all matters referred to in the amended complaint, defendants acted in good faith and in accordance with what they reasonably considered to be their lawful rights. Under these circumstances it would be unlawful and unjust to assess damages against defendants.

7. Defendants will call such witnesses and offer such exhibits as may be necessary to refute plaintiff's evidence.

James L. Highsaw, Philip Hornbein, Jr., Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S PRE-TRIAL STATEMENT
STATEMENT OF FACTS—Filed December 17, 1963

This is a class action by plaintiff, a common carrier by railroad, against the Brotherhood of Railroad Trainmen and the members of the defendant Brotherhood employed by the plaintiff.

On or about April 12, 1960, the plaintiff Railroad Company was notified by Mr. E. C. Thompson, Executive Secre- [fol. 20] tary of the National Mediation Board, that they had received a telegram from the defendant Brotherhood stating: "Account failure management D&RGW Railroad to apply NRAB First Division Awards 19372 and 19389 have authorized the men we represent that property withdrawn from service 2:30 P.M. Mountain Standard Time April 15, 1960." This strike notice against the plaintiff Railroad was given local and national newspaper coverage. Upon receipt of the above-mentioned telegram notification the plaintiff filed Civil Action No. 6763 in this Court and obtained a temporary restraining order after which the National Mediation Board proffered its services. The plaintiff and defendants accepted the proffered mediation of the National Mediation Board and met in Denver, Colorado, on or about April 26, 1960. The parties to the mediation could not agree and therefore on May 13, 1960 the National Mediation Board advised both parties that further mediatory efforts were not warranted and that the Board was closing its file on the case.

At 1:35 P.M. on May 16, 1960, defendant R. E. Carroll, being the General Chairman of the Brotherhood of Railroad Trainmen, and R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, caused a letter to be delivered by Western Union addressed to Mr. L. H. Hale, Vice President and General Manager of The Denver and Rio Grande Western Railroad Company, advising their members would withdraw from service at 2 P.M. on May 16, 1960.

The defendants at 2 P.M. on May 16, 1960, left the plaintiff's employ and caused picket lines to be put up on the plaintiff's property thereby forcing the plaintiff to cease its operation as a common carrier by railroad.

The plaintiff immediately filed its complaint in this Court against the defendants, being Civil Action No. 6796, praying for a temporary restraining order and preliminary injunction to be made permanent on final hearing restraining and enjoining the defendants from conducting the strike and paralyzing the plaintiff's operation.

This Honorable Court granted said temporary restraining order on May 16, 1960 and thereafter entered the temporary injunction and permanent injunction. See The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al (Colorado) 185 F.Supp. 369; Brotherhood of Railroad Trainmen, et al vs. The Denver and Rio Grande Western Railroad Company (United States Court of Appeals 10th Circuit 1961) 290 F.2d 266; certiorari denied, 81 S.Ct. 1925, 366 U.S. 966, 6 L.Ed.2d 1256, rehearing denied 82 S.Ct. 28, 368 U.S. 873, 7 L.Ed.2d 73.

[fol. 21] This Honorable Court and the 10th Circuit Court of Appeals held that the strike conducted by the defendant Brotherhood and its respective members and which continued for approximately nine hours, was illegal because in disputes of this nature the statutory remedy as contained in 45 U.S.C.A., Section 153, 1st (p) is exclusive.

That as a result of the two illegal strike notices and the strike which continued for approximately nine hours, serious, substantial and irreparable injury was caused to the plaintiff for which it seeks damages herein.

Stipulations

Stipulations of the parties hereto will be submitted to the Court by separate memoranda.

Witnesses

The plaintiff may call the following witnesses to testify:

1. Mr. E. B. Herdman, Director of Personnel, 1531 Stout Street, Denver 17, Colorado.

2. Mr. Ray Burris, Chief Special Agent, 1531 Stout Street, Denver 17, Colorado.

3. Mr. G. F. Fitz-William, General Freight Agent, 1531 Stout Street, Denver 17, Colorado.

The plaintiff will also call traffic managers from several large shippers throughout the United States to testify regarding the number of cars their respective companies diverted from The Denver and Rio Grande Western Railroad Company because of the threatened strike and later strike.

The plaintiff requests leave of Court to endorse additional witnesses on or before 30 days before trial.

Documentary Evidence

The plaintiff has no documentary evidence to present at this time, but requests leave of Court to file documentary evidence on or before 30 days in advance of trial.

[fol. 22] Contested Issues of Fact and Law

1. This Court, and the 10th Circuit Court of Appeals, have held the strike notices and resulting strike called by the defendants was illegal. Therefore there is no question of fact or law remaining in this respect.

2. The plaintiff submits the only issue remaining in this case is the amount of damages suffered by plaintiff as a result of the defendants' actions.

Respectfully submitted,

T. A. White, Kenneth D. Barrows, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

Pre-Trial Conference—December 17, 1963

Court Room "C", U. S. Post Office Building, Denver, Colorado.

The above-entitled matter came on for hearing on the 17th of December, 1963, before the Honorable William E. Doyle, Judge.

APPEARANCES: For the Plaintiff: Kenneth D. Barrows; For the Defendant: James L. Highsaw, Jr. and Philip Hornbein, Jr.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: You will be doing the pre-trial order.

Mr. Barrows: I guess so. It is rather unusual for me.

The Court: Do you have a memorandum setting forth your theories?

Mr. Barrows: Yes, sir.

The Court: Do you have a memorandum?

Mr. Highsaw: Yes, sir.

The Court: Does this involve damages during the work stoppage of nine hours or something of that kind?

[fol. 23] Mr. Hornbein: Presumably, that's what we understand.

Mr. Barrows: It goes a little deeper than that, Judge. You see, when an organization such as the Brotherhood serves a strike notice upon a carrier, shippers re-route their shipments so they do not get caught on the carriers' territory, because, of course, they do not want the shipment held up, so we are not limiting our damages in this case—

The Court: I wasn't asking you the scope of your claims, but I take it you maintain there are certain consequential damages—

Mr. Barrows: Definitely, very definitely.

The Court: Is there any real dispute about the facts in this case?

Mr. Barrows: I do not believe there is any dispute as to the facts. There may be on this matter of damages.

Mr. Highsaw: I think, Your Honor, on the question of strike, there is a dispute as to this. First, of course, there is no dispute that these notices that they refer to here were served. The question is whether all of the defendants that are named in the complaint were involved in this, and had any part in it. We say that some of them didn't.

The second thing is that we have served interrogatories on the railroad directed basically at finding out just what the claim of damages was for this 8 hour period and as we understood it, the railroad trains that were scheduled to run during that period, although some of them were delayed, some of them actually ran and their claim for damages is going to relate to this diversion of shipment after this notice of April 12, 1960 was sent to the National Mediation Board.

The Court: How do you prove those damages?

Mr. Barrows: The only way—we intend offering some shipper witnesses who will testify as to what shipments they would have routed over the Rio Grande had it not been for these strike notices that were out. Incidentally, one question, Jim, our trains did not run during the strike except for the California Zephyr. All of the others were tied up in the yards, but they did run after the strike was over.

[fol. 24] The Court: Did you reject any shipments?

Mr. Barrows: Not that I know of. We didn't reject any; we just didn't get them.

The Court: Well, all of your damages will be evidence of this character?

Mr. Barrows: That's right.

The Court: In other words, shipments that you maintain you would have had had it not been for this work stoppage; is that right?

Mr. Barrows: That's right.

The Court: The only other issue in the case is personal responsibility of these several defendants?

Mr. Highsaw: We are—our position also, Your Honor, is that we didn't know until yesterday when we talked with

counsel for the railroad as to what their claim of damages was going to be since interrogatories hadn't been answered yet. Their reliance on this notice of April 15, 1960, which was sent to the Mediation Board, there was not a notice that was sent to the railroad nor was it a public notice. It is our position that was not a strike notice. It is a notice sent to the Mediation Board to invoke their services; consequently, anything that anybody did after that notice is not the responsibility of any of these defendants.

It is also our position that as soon as the Mediation Board took jurisdiction, if not at the time this Court issued its temporary restraining order, that that notice became null and void and the matter was then in the hands of the National Mediation Board which continued jurisdiction.

The Court: Who sent the telegram?

Mr. Highsaw: Some officers of the Brotherhood of Railroad Trainmen.

The Court: You don't maintain that the sending of the telegram was not authorized?

[fol. 25] Mr. Highsaw: We don't say that sending the telegram was not authorized. We say it was not a strike notice, that it was a notice that was sent to the National Mediation Board.

The Court: Did anybody call a strike here at all?

Mr. Highsaw: Not under this notice. Now, Your Honor, the strike that was subsequently called was over a month afterwards, after the Mediation Board had relinquished jurisdiction and pursuant to a letter that was sent to the railroad on May 16 and between the time the railroad got that and between the time that this 8 hour strike took place, there couldn't have been any diversion of traffic. Now, Your Honor, it would be our position, and it is our position, that aside from what the evidence may show as to this period between April 12 and May 16, that we are not liable, that is, my clients are not liable for any damages, legally, that the railroad may claim for diversion of shipments during that period of time.

The Court: This will be a legal question?

Mr. Highsaw: That's right.

The Court: If there is any causal relationship between the calling of this strike and any injury which they suffered?

Mr. Highsaw: We are also taking the position, Your Honor, we would want—we would like to amend the answer, like leave to amend our answer so we can take the position which is in part based on the information we got from the carrier, yes, sir.

The Court: Any objection to this?

Mr. Barrows: I don't think it is material to the facts, but it is not an objection.

The Court: Very well, the amendment will be allowed.

Mr. Barrows: I have a few questions I would like to ask about it.

The Court: We will get to that in a minute. Now, is there anything preliminary here at all in the way of motions or anything, any amendments?

[fol. 26] Mr. Barrows: Yes, there is, Judge. Not in the sense that you mean, but the first four defenses contained in the Brotherhood's answer were all briefed, argued and overruled by Judge Phillips, so, could the pre-trial order show the overruling of these defenses here?

The Court: Well, I think it would be proper to show that a motion was granted—did he strike them?

Mr. Highsaw: No, we moved to dismiss the complaint based on these.

The Court: I think the pre-trial order should merely show what the order was; that the Judge denied the motion to dismiss which was based upon these defenses.

Mr. Barrows: Yes.

The Court: And whether that ends the matter of the defenses, I am not sure. You maintain that it does?

Mr. Barrows: In the trial of this case, are we going to re-litigate all of these four defenses that have been ruled on by Judge Phillips?

The Court: Whatever has been ruled on is the law of the case. It is purely a question of what he ruled on, what the effect of his ruling was. Does this end the first four defenses as far as you are concerned?

Mr. Highsaw: I think that's correct. I just have one slight caveat about it, Your Honor; that is, the second defense of venue. I believe that there were affidavits and other material submitted to the Court which would be sufficient if an appeal became involved in this case so that those facts would be before the Court, that's the only question I have in my mind, the necessity for us putting in evidence, in the record, which would serve as a basis for subsequently appealing it.

The Court: Surely these questions are going to be reserved to you on appeal?

Mr. Highsaw: I agree with Mr. Barrows that there is no necessity for re-litigating them before Your Honor.

[fol. 27] The Court: Very well, fine. Then you might tell the story on this in the pre-trial order that there may be some evidence in regard to the second defense, but this is merely because of the fact that the defendants do not want to waive their right to question this and in its best light on appeal.

Mr. Highsaw: In other words, Ken, we ought to take a good look at all the papers and if it—well, let me ask Your Honor, would the affidavits that were attached to the motions that were ruled on by Judge Phillips, if they were appealed, would that be considered part of the record?

The Court: I think you designate it as a basis for your appeal.

Mr. Highsaw: I will take a look at it, Ken, and maybe there won't be any evidence at all required in the light of that, very little, anyway, that would be the only one of those defenses that would be.

The Court: Any further discovery contemplated here?

Mr. Hornbein: Yes.

Mr. Highsaw: We have interrogatories which the carrier has now but he is working on them and we are per-

fectly willing to give them whatever time they feel is necessary. They do involve getting into some records, a lot of record material.

The Court: How long will it take?

Mr. Barrows: I was going to ask the Court for another 30 days on them and include this extension in the pre-trial order.

The Court: Will this take care of all the discovery?

Mr. Highsaw: I doubt—

The Court: How much time do you want to complete all discovery? 60 days?

Mr. Hornbein: It is going to depend in part on when we get the names of the plaintiffs' additional witnesses which they would endorse. We will probably want to take their depositions, these witnesses. I am referring to traffic managers for the shippers that the railroad claims they lost freight from.

[fol. 28] The Court: How much time do you think it is going to take?

Mr. Hornbein: I would say at least 45 days after we get the names of these witnesses from them.

The Court: When will you furnish the names?

Mr. Barrows: Just as quickly as possible.

The Court: 15 days?

Mr. Barrows: I don't know if I can furnish them all that soon because I want to re-contact all of these shippers.

The Court: 20 days?

Mr. Barrows: Make it 30 days.

The Court: 25. Okay, 30 is all right, and then you will have 45 days, let's see, you will have a total of 75 days to take these depositions or 35 days after—45 days. He may furnish them prior to the 30 day period, if he has them. Is this a trial to court?

Mr. Hornbein: Yes.

Mr. Barrows: Yes, it is.

Mr. Hornbein: We also may want to move for the production of certain records of the plaintiff after we get their—

The Court: You pursue any discovery you like during this period, I think, you may have more discovery, too.

Mr. Barrows: We may, yes.

The Court: How long will it take to try this case finally?

Mr. Barrows: I actually wouldn't think over two days, once we get it boiled down.

Mr. Highsaw: I guess we might get it out of the way in one.

[fol. 29] Mr. Barrows: There is still a lot of preliminary work to do, Judge. Actually, as you probably know, all of us here have been still involved in these continuing enforcement suits going out of this, too, by the Brotherhood against the Railroad, and the appeal of those and I am afraid this one is just kind of slipping by.

The Court: Any chance that the case will be settled?

Mr. Barrows: I don't know. We discussed it yesterday. I didn't see much likelihood.

Mr. Highsaw: I don't believe so.

The Court: Do you have any exhibits to be marked?

Mr. Barrows: I would like to mark this. Now this is a—I could not find the original letter from Mr. Carroll to make good copies, so I just had it typed.

The Court: Give it to the Clerk.

Mr. Barrows: You can confirm that and the same thing with this telegram. I just couldn't get good copies. It is easier to read a typewritten copy.

The Court: Can you stipulate to the authenticity of these documents?

Mr. Highsaw: Yes, we will stipulate them. I would like to check the exact language against the documents in our file, but there is no question about the authenticity or necessity of producing the original document.

The Court: Do you have any exhibits to offer?

Mr. Highsaw: Not at this time, Your Honor.

The Court: Each side will have 20 days prior to trial within which to tender exhibits, additional exhibits, furnishing the other side with a copy thereof. Do you have

any questions about the testimony of the witnesses listed? Are they—do you have a list of witnesses by the way?

[fol. 30] Mr. Hornbein: Not at this time, Your Honor.

Mr. Highsaw: I think it is going to depend almost entirely on their answer to the interrogatories with respect to the damage matter because there is going to be no factual dispute about the other aspects of it, mostly legal argument.

The Court: Do you have any question about the testimony of Herdman, Burris, or Fitz-William, the ones listed by the plaintiff?

Mr. Highsaw: What are Mr. Burris and Mr. Fitz-William going to testify about?

Mr. Barrows: Mr. Burris is, of course, Chief Special Agent. He would testify as to the duration of the actual strike, the time the pickets were removed, such as that; if it is necessary, perhaps we can stipulate that.

Mr. Highsaw: One thing I might suggest is that if you could get up a statement of what your views are to the duration and so forth, we will then check and maybe we can stipulate. We discussed this yesterday and our problem then was that on our side none of us know precisely and exactly; for example, we don't know how many men—we know that some men didn't report for service and we know there were some pickets at some places. We know that this ended at some time that evening, but we don't know exactly and precisely when. If Mr. Barrows can get up a statement, I am sure we can probably arrive at a stipulation and eliminate the necessity of that testimony.

Mr. Barrows: You ought to read your client's newspaper. It is all in there.

Mr. Highsaw: Maybe that's a good place to get it.

The Court: Will you write up some statement of the facts—

Mr. Barrows: It would only be as to the duration because witnesses like Fitz-William, why, I endorsed him is because he would be the one to tell what the Rio Grande's loss was, revenue loss from the number of cars a shipper

would use which he would say were diverted from the Rio Grande and I couldn't work up anything on him. Mr. Burris, I probably could, I could give you the times these pickets were removed.

[fol. 31] The Court: Each side can name additional witnesses at any time 20 days prior to trial. There should be a brief statement as to the testimony of such witnesses.

Mr. Hornbein: Now, with the exception of these witnesses that are going to testify as to the failure of shippers to send freight over the Rio Grande, and I understand we are going to get their names within 30 days—

The Court: Yes, there is a specific order on that. I don't know that there is anything else we can accomplish here now, gentlemen.

Mr. Barrows: I wanted to ask a question, a couple of questions, about this sixth defense. You allege here "that the plaintiff failed to take reasonable measures to prevent or mitigate its alleged damage, and that any damage which the plaintiff may have sustained is the result of the plaintiff's failure to take such action."

What do you have in mind on that; what is the basis of this?

Mr. Highsaw: We have in mind what measures, if any, you did or did not take with respect to this notice of April 12 advising your shippers of what action you did or didn't take, advising them about the obtaining of the temporary restraining order and what other actions you might have taken in the interim with your shippers. That's primarily what we had in mind in connection with this. Up until yesterday we had thought that based on the complaint the claim of damages was going to be a claim of damages for loss of revenue and during the period of the work stoppage which presented somewhat different problems from the one that we have now and that's what we have in mind, because we would take the position that, for example, that you couldn't claim damages for "X" company not diverting freight if you hadn't made reasonable efforts to tell them you had a restraining order, and the Mediation Board moved in under the law and there couldn't be anything

happen for a month—until after a period of time after the Mediation Board relinquished the jurisdiction. We think you had an obligation to do that. If you didn't, you can't claim damages for somebody not sending shipments over the railroad.

Mr. Barrows: Does this defense apply only to the April 12 notice then?

[fol. 32] Mr. Highsaw: Well, it might apply to the May 16, depending on what—well, frankly, at this moment we don't have anything in mind with respect to the May 16 unless some facts that I am not aware of at the moment develop because there was so little time between the time you had the May 16 notice and the time of the strike, the strike actually took place, that I think only—

Mr. Hornbein: If the plaintiffs claim any damages subsequent to May 16, why, then, we certainly would.

Mr. Highsaw: That's right, you got the restraining order that afternoon and if there was any damage based on say May 16 and May 25 or something like that, we would take the same position.

Mr. Barrows: Do you claim that we had any duty to mitigate if shippers said, "Well, during this transition period between the temporary restraining order the temporary injunction we just won't ship."

Mr. Highsaw: We take the position, of course, if you say, as you say in this paper here, that we can't be held liable for the failure on the part of your customers to ship unless we did something directly to instigate this, but aside from that, just this defense here. If you had notified them of these things, you might have taken the action to mitigate as far as these claims of damages are concerned. That's what this is directed to.

Mr. Barrows: Well, in the first part of your statement you referred to—you weren't certain that all of the named defendants were involved in this calling of the strike and serving the notice and as you know, the original complaint in this case was only filed against the Brotherhood and

against your motion that these additional ones were named as defendants to get at the Brotherhood itself.

Mr. Highsaw: To get around the venue problem.

Mr. Barrows: Do your defenses apply to the Brotherhood as such as well as to the individual ones or were you just referring to the individual defendants?

Mr. Highsaw: We were referring to the individual defendants. We are not relying on any contention that these notices here were not authorized or approved by the Brotherhood.

[fol. 33] Mr. Barrows: In as far as the legal issue on the Brotherhood, do we have anything except the question of damages?

Mr. Highsaw: Yes, we have the same questions that we have raised, namely, the question of whether we can be liable at all for damages during the period that you are talking about. We don't have any factual issues, if that's what you mean.

Mr. Barrows: It's just a question of damages. Damage causation.

The Court: Remoteness as to the defendants in relation to damages, is that right?

Mr. Highsaw: Yes. It might well become important if there was an appeal taken; for example, on some of these individual defendants. That's why we are taking the position as far as I can see. Any of the documents that have been produced would only show that Mr. Carroll was the only one who had any connection with it at all.

Mr. Barrows: These individual defendants wouldn't be in here if it hadn't been for your motion as to question of service of process upon the Brotherhood.

Mr. Highsaw: That's not quite accurate because the Railroad in the memorandum filed on the Railroad's behalf in opposition to our motion justified the naming of these defendants among others, saying that it might turn out that these individuals were the people who were responsible for this action and that it was unauthorized Brotherhood of Railroad Trainmen and had nothing to do with it.

Mr. Barrows: That was before your statement here that the notices and things did have the authority of the Grand Lodge. I am just wondering about the possibility of letting these individual ones out.

Mr. Highsaw: I can't let them out and agree that you have got venue, if that's what you want. I want to preserve our venue.

The Court: Anything further, gentlemen? I think that's all.

[fol. 34] Mr. Barrows: Since we are going to do some work before this pre-trial order is filed or perhaps further agreements between the parties here could we have a little more time to file a pre-trial order than usual?

The Court: I will give you 30 days.

Mr. Barrows: I think 30 days is sufficient.

The Court: If you need any more time, we will give it to you.

It is not a complex pre-trial order; I don't think there is any dispute as to the facts.

Filed February 14, 1964.

[fol. 52]

IN THE UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Entered February 14, 1964

Pretrial conference was held herein on Tuesday, December 17, 1963, before Honorable William E. Doyle, in chambers. Kenneth D. Barrows appeared on behalf of plaintiff: and James L. Highsaw and Phillip Hornbein, Jr. appeared on behalf of defendants. The following matters were agreed to as and for pretrial orders herein:

1. Jurisdiction: Jurisdictional issues were raised by the defendants in their motion filed on or about December 24, 1962. This matter was briefed by the parties herein and on August 29, 1963, Orie L. Phillips, Circuit Judge assigned, overruled defendants' motions. The defendants

have raised jurisdictional issues in their Second and Fourth Defense as contained in their answer. Since these matters have already been ruled upon, they will not be relitigated at the time of trial, but they are not waived by defendants and may be raised on appeal.

2. Amendments to pleadings: Leave of Court was requested by defendants and granted by the Court for them to amend their Answer by adding a Sixth Defense. Leave of Court was requested by plaintiff, and granted by the Court, for it to amend its prayer in both alleged counts by increasing it to $62,482.00;

3. Preliminary motions remaining to be determined: None.

4. General nature of the claims of the parties:

(a) Plaintiff's claims:

[fol. 53] (1) This is a class action by plaintiff, a common carrier by railroad, against the Brotherhood of Railroad Trainmen and the members of the defendant Brotherhood employed by the plaintiff.

(2) On or about April 12, 1960, the plaintiff Railroad Company was notified by Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, that they had received a telegram from the defendant Brotherhood stating: "Account failure management D&RGW Railroad to apply NRAB First Division Awards 19372 and 19389 have authorized the men we represent that property withdrawn from service 2:30 P.M. Mountain Standard Time April 15, 1960." (Plaintiff Exhibit No. 2). This strike notice against the plaintiff Railroad was given local and national newspaper coverage. Upon receipt of the above mentioned telegram notification the plaintiff filed Civil Action No. 6763 in this Court and obtained a temporary restraining order, after which the National Mediation Board proffered its service. The plaintiff and defendants accepted the proffered mediation of the National Mediation Board and met

in Denver, Colorado, on or about April 26, 1960. The parties could not agree and therefore on May 13, 1960, the National Mediation Board advised both parties that further mediatory efforts were not warranted and that the Board was closing its file on the case.

(3) At 1:35 on May 16, 1960, defendant, R. E. Carroll, being the General Chairman of the Brotherhood of Railroad Trainmen, and R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, caused a letter (Plaintiff Exhibit No. 1) to be delivered by Western Union addressed to Mr. L. H. Hale, Vice President and General Manager of The Denver and Rio Grande Western Railroad Company, advising their members would withdraw from service at 2 P.M. on May 16, 1960.

(4) The defendants at 2 P.M. on May 16, 1960, left the plaintiff's employ and caused picket lines to be established on the plaintiff's property, thereby forcing the plaintiff to cease its operation as a common carrier by railroad.

(5) The plaintiff immediately filed its complaint in this Court against the defendants, being Civil Action No. 6796, praying for a temporary restraining order and preliminary injunction to be made permanent on final hearing restraining and enjoining the defendants from conducting the strike and paralyzing the plaintiffs' operations.

[fol. 54] (6) This Court granted said Temporary restraining order on May 16, 1960, and thereafter, on June 2, 1960, entered the temporary injunction and on July 25, 1960, entered a permanent injunction. See The Denver & Rio Grande Western RR. Co. v. Brotherhood of Railroad Trainmen, et al. (Colo.) 185 F. Supp. 369; Brotherhood of Railroad Trainmen, et al. v. The Denver and Rio Grande Western RR. Co. (U.S. Court Appeals, 10th Circuit, 1961) 290 F.2d 266; certiorari denied 81 S.Ct. 1925, 366 U.S. 966, 6 L. Ed.2d 1256, rehearing denied 82 S.Ct. 28, 368 U.S. 873, 7 L.Ed. 73.

(7) This Court and the 10th Circuit Court of Appeals held that the strike conducted by defendant Brotherhood and its respective members, which continued for approximately nine hours, was illegal because in disputes of this nature the statutory remedy as contained in 45 U.S.C.A. Sec. 153 first (p) is exclusive. That as a result of the two illegal strike notices and the resulting strike which continued for approximately nine hours, serious, substantial and irreparable injury was caused to plaintiff for which it seeks damages herein.

(8) Plaintiff also claims that on or about May 16, 1960, the defendants entered into a conspiracy or combination with its members and officers for the purpose of hindering and preventing plaintiff from carrying on its duties and lawful business as a common carrier.

(b) Defendants' claims:

(1) Defendants rely on all defenses set forth in their answer to the amended complaint.

(2) Defendants contend that the plaintiff failed to take reasonable measures to mitigate its alleged damages.

(3) Defendants generally deny that any damages were sustained by the plaintiff as a result of any acts of defendants.

(4) Defendants deny that they can be held liable for the failure on the part of plaintiff's customers to utilize the plaintiff's services unless such failure was directly instigated by the Defendants.

[fol. 55] (5) Defendants contend that they cannot be held liable for actions taken by third persons, over whom they have no control, by reason of a notice sent to the National Mediation Board.

(6) In all matters referred to in the amended complaint, defendants acted in good faith and in accordance with what they reasonably considered to be their legal rights. Under

the circumstances it would be unlawful and unjust to assess damages against defendants.

(7) Defendants deny that the aforesaid communications were publicized.

(8) Defendants assert that if the aforesaid communications were publicized, such publications did not result from any actions of defendants, and the defendants cannot be held responsible therefor.

(9) Defendants admit that some of the defendants temporarily interrupted their work on May 16, 1960, but deny that all of the defendants or all of the plaintiff's employees interrupted their work, and deny that the plaintiff completely ceased its operations on said date.

(10) Defendants deny that the plaintiff sustained the injuries or damages alleged in the complaint, or any part thereof.

(11) Defendants deny that the communications of April 12, 1960, and May 16, 1960, referred to above, constituted strike notices or were illegal.

(12) Defendants deny that they entered into any kind of conspiracy or contribution for the purpose of hindering or preventing the plaintiff from carrying on its duties or lawful business, or for any other improper objective or purpose.

(13) The defendants assert that if the plaintiff did sustain any injury or damage, the same was not the proximate result of any acts of the defendants, or any of them.

(14) Defendants deny that this Court, or the United States Court of Appeals for the Tenth Circuit, has held that the communications of April 12, 1960 or May 16, 1960, constituted illegal strike notices and deny that either of said courts found or held that the work stoppage occurring on May 16, 1960, caused injury or damage to the plaintiff.

[fol. 56] 5. Uncontroverted facts:

(a) The defendants stipulate as to the authenticity, but not the materiality or relevance, of plaintiff's exhibits Nos. 1, 2, 3 and 4.

(b) The actions taken by the defendants on April 15, 1960, and on May 16, 1960, were authorized by the Brotherhood of Railroad Trainmen.

(c) Any agreement or stipulation that may appear from the transcript of the pretrial conference which is attached hereto and made a part of the pretrial order.

6. Issues of fact and law:

A. Contested Issues of Fact:

(1) Whether or not the plaintiff sustained any damage.

(2) The nature and amount of the plaintiff's alleged damages.

(3) The proximate cause of the alleged damage.

(4) The nature and extent of the publicity, if any, given to the communications of April 12, 1960, and May 16, 1960, and the person or persons responsible for such publicity.

(5) Whether or not the plaintiff took any action to mitigate its alleged damages, and if so, the nature of such action.

(6) Whether or not the plaintiff's actions, if any, to mitigate its alleged damages, constituted a reasonable effort on its part to mitigate such alleged damages.

B. Contested Issues of Law:

The contested issues of law, in addition to those implicit in the foregoing are:

(1) The proximate cause of plaintiff's alleged damages.

(2) Whether or not the communication of April 12, 1960, was illegal.

[fol. 57] (3) Whether or not the communication of May 16, 1960, was illegal.

(4) Whether or not the defendants can be held liable for the plaintiff's alleged damages.

(5) Whether or not the plaintiff took reasonable measures to mitigate its alleged damages.

7. Witnesses:

(a) The plaintiff may call the following witnesses:

(1) Mr. E. B. Herdman

(2) Mr. Ray Burris

(3) Mr. G. F. Fitz-William

(4) Mr. J. K. Speight, Western Traffic Manager, 291 Monadnock Building, San Francisco, California. Mr. Speight will testify regarding the diversion of shipments by shippers in the Salt Lake City, Utah area.

(5) The plaintiff may also call traffic managers from several large shippers throughout the United States to testify regarding the number of cars their respective companies diverted from the Denver and Rio Grande Western Railroad Company because of the threatened strike and resulting strike and for such period of time until the permanent injunction was issued.

(6) Mr. R. K. Bradford, Vice President in charge of traffic.

(7) Mr. Henry P. Crawford or Mr. Eugene S. Knutson.

(b) The defendants did not list any witnesses at the pretrial conference because their discovery procedure has not been completed.

(c) In the event there are other witnesses to be called at the trial a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least 20 days prior to trial.

[fol. 58] 8. Exhibits:

A. Plaintiff's exhibits:

(1) The plaintiff filed the following exhibits:

Exhibit 1—Copy of letter from defendant signed by R. E. Carroll and R. H. McDonald, dated May 16, 1960, addressed to Mr. L. H. Hale, Vice President-General Manager of The Denver and Rio Grande Western Railroad Company.

Exhibit 2—Telegram from Mr. E. C. Thompson, Executive Secretary, National Mediation Board, dated April 15, 1960.

Exhibit 3—Mailgram from Ford Motor, Co. dated May 18, 1960.

Exhibit 4—Telegram from Ford Motor Co. dated June 1, 1960.

Exhibit 5—Trainman's News dated May 30, 1960.

(2) The defendants admit the authenticity, but not the materiality or relevance, of plaintiff's Exhibits 1, 2, 3, and 4.

B. Defendants' exhibits:

The defendants did not offer any exhibits at the pretrial conference for the reason that their procedure for discovery will not be completed until the plaintiff has answered the written interrogatories heretofore served upon it, and supplied to the defendants the names of the witnesses to be called by the plaintiff relative to its claim for damages. The defendants reserve the right to offer such exhibits as

they deem advisable based upon information obtained through discovery.

C. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least 20 days prior to the trial.

9. Discovery: The defendants have served interrogatories upon the plaintiff but to date of this conference have not been answered. Plaintiff is hereby granted an additional 30 days to answer said defendants' interrogatories. The plaintiff, within 30 days hereof, will notify defendants of the shipper witnesses they intend to call to prove the number of cars diverted from the plaintiff resulting from the strike notices and resulting strike and the loss suffered [fol. 59] thereby. The defendants shall complete their discovery within 45 days after being advised of the aforementioned shipper witnesses.

10. Modifications—Interpretations: Hereafter this order will control the course of the trial and may not be amended except by consent of the parties and the Court or by order of the Court to prevent manifest injusfices. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the record of this conference to the extent reported by stenographic notes and to the pleadings.

11. Trial and estimated time: Trial of this case will be to the Court and the estimated time of trial is two days.

Done at Denver, Colorado, this 14th day of Feb. 1964.

By the Court:

William E. Doyle, United States District Judge.

Approved: Kenneth D. Barrow, Attorney for Plaintiff.

Philip Hornbein Jr., Attorney for defendants.

[fol. 68]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 12, 1965

I. Defendants' Proposed Findings of Fact

1. Plaintiff is a corporation organized under the laws of the State of Delaware with the principal place of business in Denver, Colorado. Plaintiff owns and operates a railroad system of about 2100 miles in inter and intrastate commerce and is a carrier within the meaning of and subject to the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of the plaintiff. The general offices and headquarters of the Brotherhood are located in Cleveland, Ohio. The General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff maintains an office in the Kittredge Building, Denver, Colorado, to carry on the business of such Committee. This Committee is composed of representatives of local lodges the membership of which consists of employees of the plaintiff and of other railroads represented by the Brotherhood. At all times material herein a collective bargaining agreement has been in effect between the plaintiff and the defendant Brotherhood covering rates of pay, rules, and working conditions of plaintiff's employees represented by the Brotherhood.

3. On or about February 15, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood based on the ground that the plaintiff had violated the collective bargaining agreement governing the employment of these em-

ployees in assigning work to trainmen beyond the scope of such agreement. On January 20, 1960, said Board issued Award No. 19389, sustaining these claims, and its accompanying order directing the plaintiff to comply therewith.

4. On or about March 3, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood based on the ground that the plaintiff had violated the collective bargaining agreement governing the employment of these em-
[fol. 69] ployees in changing their assignments without prior negotiation and agreement with the union. On December 17, 1959, the Board issued its Award No. 19372, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

5. Plaintiff refused to comply with Awards Nos. 19389 and 19372. A dispute then arose between the Brotherhood and the plaintiff with respect to such compliance. The Brotherhood threatened to call a strike on the property of the plaintiff on April 15, 1960, but such strike did not materialize because both the plaintiff and the Brotherhood accepted the mediation services of the National Mediation Board in the dispute. These services were terminated on or about May 13, 1960. Thereafter, on May 16, 1960, at approximately 2:00 p.m., employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff because of the plaintiff's failure to comply with Adjustment Board Awards Nos. 19389 and 19372. This action was authorized by the President of the Brotherhood. The strike continued until the evening. This Court issued a temporary restraining order on that date, which was served upon the General Chairman of the Brotherhood General Grievance Committee at about 6:30 p.m., and he immediately began issuing instructions to local groups by telegram and telephone calling off the strike. The strike

ceased in the Denver area at about 8:30 p.m. and in the Salt Lake City area at about 10:00 p.m.

6. Subsequently, on or about June 2, 1960, in Civil Action No. 6796, this Court issued a preliminary injunction against the renewal or conduct of a new strike in such dispute. On July 27, 1960, this Court issued a permanent injunction. Denver & Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369. This judgment was affirmed by the United States Court of Appeals for the Tenth Circuit. Denver & Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, 290 F.2d 266, cert. den. 366 U.S. 966.

7. The trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood.

[fol. 70] 8. All passenger and freight trains of the plaintiff scheduled to operate on May 16, 1960, did, in fact, operate although delayed. The plaintiff does not claim any damage or loss of business profits during the period of the strike on May 16, 1960.

9. The Ford Motor Company or companies supplying parts to the Ford Motor Company during the period May 19, 1960, to June 1, 1960, diverted approximately 200 carload shipments to other carriers, which would have been shipped at least in part over the lines of the plaintiff had it not been for the threat of a new or renewed strike by the Brotherhood in the event this Court should dissolve the restraining order and deny the plaintiff's request for an injunction. These shipments consisted of approximately 117 carloads of parts for cars shipped from plants owned by the Ford Motor Company or from suppliers of the company in the eastern part of the United States to points

west of Denver and of 83 carloads of assembled cars shipped from the Wixom, Michigan, plant of the Ford Motor Company to Salt Lake City.[1]

10. The total revenue which the plaintiff would have received had the shipments described in paragraph 9 above been transported over the lines of the plaintiff amounts to approximately $70,232.02. During the month of May 1960, the plaintiff's operating expenses were 68.42% of its freight revenue, leaving a net of 31.58%. Therefore, if the plaintiff had transported the shipments in question, it would have received a net profit from such transportation of $22,179.27. The trial record shows that the plaintiff paid only that portion of its employees during the period of the strike on May 16, 1960, who were called for duty and were not used. The record does not show the amount of such payments or the amount of wages saved by the carrier during the period of the strike on May 16, 1960.[2]

11. The Ford Motor Company did not consult with the Brotherhood with respect to its future intentions prior to the making of the company's decision to reroute shipments from the lines of the plaintiff Railroad.

[fol. 71] 12. The plaintiff did not promptly and properly inform the Ford Motor Company of the legal situation prevailing with respect to a strike threat after May 16, 1960. The plaintiff did not promptly inform the Ford Motor Company of its agreement with the Brotherhood made in this Court on May 26, 1960, that the restraining order could remain in effect until the Court had acted upon the plaintiff's request for injunctive relief. The record shows that the Ford Motor Company resumed shipments over the lines of the plaintiff when it was informed of the

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[1] This proposed finding is submitted only if the Court proceeds to a consideration of the amount of diversion and accepts the testimony of Mr. Henry Crawford with respect thereto.

[2] The same considerations apply to this proposed finding as in the case of paragraph 9 above.

agreement of May 26, 1960. However, there was a delay in such resumption by reason of the plaintiff's failure to promptly inform the Ford Motor Company of such situation.[3]

II. Defendants' Proposed Conclusions of Law

1. The complaint must be dismissed as to individual defendants B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather, since the plaintiff has failed to sustain its burden of proof with respect to these defendants.

2. None of the defendants are liable in damages for any diversion of shipments from the lines of the plaintiff Railroad by shippers during the period May 19, 1960, through June 1, 1960, because of a future threatened strike by the Brotherhood over the plaintiff's failure to comply with Awards Nos. 19389 and 19372 of the National Railroad Adjustment Board since such strike would have taken place only if this Court had dissolved the restraining order against the defendant Brotherhood and denied plaintiff's request for injunctive relief. Such a strike would have been a lawful strike. Plaintiff is not entitled to damages for diversion of shipments based upon the threat of a lawful strike.

3. None of the defendants are liable in damages for any claimed loss of business profits resulting from the strike of May 16, 1960, because such strike in part was provoked by the carrier's refusal to accept the interpretation of the collective bargaining agreement between the Brotherhood and the plaintiff set forth in Award No. 19389. While the [fol. 72] plaintiff had a legal right under Section 3, First (m) of the Railway Labor Act to refuse to pay the money award involved in such decision, it did not have the legal

[3] The same considerations apply to this proposed finding as in the case of paragraph 9 above.

right to refuse to put into effect the contract interpretation involved,

4. In any event, the plaintiff has not proved with the certainty required by law the amount of loss of business profits from the diversion of shipments by shippers over the lines of the plaintiff during the period May 19, 1960, through June 1, 1960. The claimed loss of revenue from this source is uncertain. Moreover, the plaintiff has not sustained its burden of showing with reasonable certainty the amount of such loss because it has failed to show that it did not save from wages not paid to employees during the period of the strike on May 16, 1960, a sum greater than any claimed loss of business profits from diverted shipments.

5. Finally, the defendant Brotherhood and Mr. R. E. Carroll cannot be held liable for damages for any claimed loss of business profits growing out of diversion of shipments over the lines of the plaintiff for the period of May 19, 1960, through June 1, 1960, because the plaintiff did not promptly and properly inform the shippers of the legal situation which would assure a continuance of plaintiff's services. In addition, plaintiff did not promptly inform said shippers of the agreement reached on May 26, 1960, in the proceedings before this Court for a continuance of the restraining order until this Court acted upon plaintiff's request for relief, thus assuring the continuance of plaintiff's services until the issue of whether or not the Brotherhood could conduct a strike was litigated in this Court. Plaintiff has thus not discharged its duty of taking all reasonable steps to mitigate the damages claimed. Any diversion of shipments which took place was a direct result of this failure by the plaintiff.

Judgment is therefore granted to the defendants.

[fol. 73]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed February 8, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel, enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This is an action brought by plaintiff for damages growing out of a May 16, 1960, strike by defendants against plaintiff.

2. Plaintiff, The Denver and Rio Grande Western Railroad Company ("Rio Grande"), is a corporation organized under the laws of the State of Delaware and engages in interstate and intrastate common carrier operations by railroad. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado to Salt Lake City and Ogden, Utah, with numerous branches on those lines. Its principal operating office is in Denver, Colorado.

3. Defendant Brotherhood of Railroad Trainmen ("Brotherhood") is a labor organization and is the duly designated representative under the Railway Labor Act of a class of employees of plaintiff. Defendant carries on its business as representative in Denver, Colorado. At all times material herein, an agreement was in effect between the Rio Grande and the Brotherhood covering rates of pay, rules and working conditions of the Rio Grande's employees represented by the Brotherhood.

4. The Brotherhood has an office and carries on business in Denver, Colorado. The Brotherhood consists of a

Grand Lodge and several subordinate Local Lodges. Defendants B. E. Roark, A. J. Myers, J. W. Crocker, Carl F. Ahrens, N. E. Doolittle, M. C. Feather and R. E. Carroll are chairmen of Local Lodges of the Brotherhood in the State of Colorado, and defendant M. C. Brown is chairman of a Local Lodge of the Brotherhood in the State of Utah. Apart from defendant Brown, who resides within the State of Utah, each of said defendants resides within the State of Colorado. Each of said seven individual defendants as a Local Chairman acts for the Brotherhood in enforcing schedules, rules and working conditions and in matters of [fol. 74] grievance adjustments on the Rio Grande with respect to the members of the Local Lodge of which he is Local Chairman. Each of said seven individual defendants is in the employ of the Rio Grande and each fairly and adequately represents his organization and the members thereof employed by the Rio Grande.

5. Defendant R. E. Carroll resides in the State of Colorado and is a General Chairman of the General Grievance Committee, Denver & Rio Grande Western Railroad System, Brotherhood of Railroad Trainmen, and fairly and adequately represents the Brotherhood and the members thereof employed by the Rio Grande on its railroad sy[illegible]m.

6. Defendants collectively represent substantially all of the brakemen of the Rio Grande engaged in the operation of its trains. The employees of the Rio Grande represented by the defendants constitute a class, all of whom have an interest in this proceeding in the nature of a defendant's interest, but who are too numerous to be named individual defendants herein, and it is impracticable to make or name all of them as such. Defendants herein have a general and common interest involved in this suit with each other and with all members of the defendant Brotherhood employed by the Rio Grande, and can and do fairly and properly represent all of said employees herein as defendants in this action as a class suit.

7. On or about February 15, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain conductors and brakemen on account of herding work performed at Rio Grande's North Yard. On January 20, 1960, through Referee Sembower, the Adjustment Board rendered Award 19389 sustaining these claims. Immediately thereafter the Rio Grande ceased requiring conductors and brakemen to perform the herding work at its North Yard. However, considering Award 19389 to be erroneous, the Rio Grande refused to pay the money claims.

8. On or about March 3, 1953, defendants submitted to the National Railroad Adjustment Board, First Division, pursuant to Section 3 First (i) of the Railway Labor Act, claims for additional pay for certain brakemen on account of an allegedly improper turnaround freight run between Provo and Eureka, Utah. On December 17, 1959, through Referee Sembower, the Adjustment Board rendered Award 19372 sustaining these claims. A settlement was reached [fol. 75] between the parties concerning the turnaround practice in September 1960. However, because it considered Award 19372 to be erroneous, the Rio Grande refused to pay the money claims.

9. Because of the Rio Grande's failure to comply with the money claims in Awards 19389 and 19372, defendants were entitled to file an enforcement suit in the United States District Court under Section 3 First (p) of the Railway Labor Act. The enforcement procedure provided by Section 3 First (p) is the exclusive means of enforcing awards of the National Railroad Adjustment Board.

10. On April 12, 1960, defendants notified the National Mediation Board that their members would withdraw from service on the lines of the Rio Grande, beginning at 2:30 p.m. on April 15, 1960. The National Mediation Board thereupon proffered its mediation services. Defendants

postponed their threatened strike during mediation, which continued until May 13, 1960.

11. On May 16, 1960, at 1:30 p.m. defendants notified the Rio Grande that their members would withdraw from service, beginning at 2:00 P.M. on May 16. Thereupon, the employees represented by the Brotherhood went on strike to enforce payment of said two awards. The strike continued until eight hours later when it ceased pursuant to a temporary restraining award entered by this Court (Judge Chilson) at 4:20 P.M. on May 16, 1960. The strike was called by defendants for the purpose of enforcing said two awards of the Adjustment Board and the strike was authorized by the president of the Brotherhood and the individual defendants participated therein.

12. On June 2, 1960, a preliminary injunction was entered against the continuance of said strike, and on July 27 a permanent injunction was entered to the same effect. See Denver & Rio Grande Western R. Co. v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369 (Dist. of Colo., 1960), affirmed, 290 F.2d 266 (C.A. 10, 1961), certiorari denied, 366 U.S. 966.

13. During the May 16, 1960 strike, the operation of plaintiff's passenger and freight trains was delayed. Thereafter, the Ford Motor Company and its suppliers diverted 274 carload shipments to other carriers, which would have been shipped over the lines of the Rio Grande except for said strike.

[fol. 76] 14. The total revenue which the Rio Grande would have received from the shipment of said 274 carloads amounts to $89,743.38, or a net profit to the Rio Grande of $37,988.37.

15. From May 16, 1960 through June 1960, the plaintiff regularly informed the Ford Motor Company of the developments in the litigation concerning said strike. The Rio Grande continuously endeavored to persuade the Ford

Motor Company not to divert any shipments and to restore shipments during said period.

16. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

Conclusions of Law

Under the foregoing Findings of Fact, the Court concludes that:

1. The cause of action here asserted by the Rio Grande is one arising under the laws of the United States regulating commerce and the Court has jurisdiction of the parties and subject matter of said cause under Sections 1331 and 1337 of the Judicial Code (28 USC §§ 1331 and 1337).

2. The complaint herein states a claim upon which relief should be granted.

3. By calling and engaging in this strike, defendants failed to exhaust the remedies provided by Section 3 First (p) of the Railway Labor Act and defendants violated their duties under that statute.

4. The illegal strike called by defendants forced a suspension of the Rio Grande's operations as a common carrier and caused traffic to be diverted by shippers from the lines of the Rio Grande, thereby resulting in loss of revenue. The Rio Grande was damaged by the calling and carrying out of defendants' unlawful strike in the amount of $37,988.37.

5. In addition to violating Section 3 First (p) of the Railway Labor Act, defendants entered into an illegal conspiracy to hinder and prevent the Rio Grande from carrying on its duties and lawful business as a common carrier, in that they wilfully and without excuse caused an illegal [fol. 77] strike or concerted work stoppage to occur on the Rio Grande.

6. The Rio Grande has established with reasonable certainty that it lost at least $37,988.37 net profit during the period from May 16, 1960 through July 27, 1960 (when this Court issued its permanent injunction) because of the diversion of shipments from the Rio Grande which took place as a direct result of defendants' illegal actions. Judgment is therefore granted to the plaintiff.

An appropriate judgment will be entered when presented by the plaintiff.

IN THE UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered March 8, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel, enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff is a corporation organized under the laws of the State of Delaware with its principal place of business in Denver, Colorado. It owns and operates an extensive railroad system in interstate and intrastate commerce, and is a "carrier" within the meaning of the Railway Labor Act.

2. Defendant, Brotherhood of Railroad Trainmen, is a labor organization and the duly designated representative under the Railway Labor Act of a class of employees of the plaintiff.

3. Defendant, R. E. Carroll, is the General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff. The other named defen-

dants are all local chairmen of local lodges of the defendant Brotherhood.

[fol. 78] 4. At all times material to this action a collective bargaining agreement was in effect between the plaintiff and the defendant Brotherhood covering rates of pay, rules and working conditions of plaintiff's employees represented by the Brotherhood.

5. On or about February 15, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood. They were based on the ground that the plaintiff had violated the collective bargaining agreement in assigning work to trainmen beyond the scope of such agreement. On January 20, 1960, the Adjustment Board issued Award No. 19389, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

6. On or about March 3, 1953, the Brotherhood submitted to the First Division of the National Railroad Adjustment Board, pursuant to Section 3, First (i) of the Railway Labor Act, claims on behalf of employees of the plaintiff represented by the Brotherhood. They were based on the ground that the plaintiff had violated the collective bargaining agreement in changing employee assignments without prior negotiation and agreement with the union. On December 17, 1959, the Board issued its Award No. 19372, sustaining these claims, and its accompanying order directing the plaintiff to comply with the award.

7. Plaintiff refused to comply with Awards Nos. 19389 and 19372. This created a dispute between the Brotherhood and the plaintiff. The Brotherhood threatened to call a strike on the property of the plaintiff on April 15, 1960, but it never materialized because both plaintiff and the Brotherhood accepted the mediation services of the Na-

tional Mediation Board. These services were terminated on or about May 13, 1960.

8. On May 16, 1960, at approximately 2:00 p.m., employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff because of the plaintiff's failure to comply with the Adjustment Board Awards and went on strike to enforce payment of the awards.

9. This Court (Judge Chilson) issued a temporary restraining order on that date, which was served upon the General Chairman of the Brotherhood Grievance Committee at about 6:30 p.m. He immediately began contacting [fol. 79] local groups to call of the strike. The strike ceased in the Denver area at about 8:30 p.m. and in the Salt Lake City area at about 10:00 p.m.

10. Subsequently, officials of The Ford Motor Company met and determined that a strike threat still existed. A mailgram sent by Ford on May 18, 1960, to be effective on May 19, 1960, announced that traffic which would normally move over plaintiff's routings had been diverted to alternate routings.

11. Plaintiff gave assurances to the Ford Motor Company that it would be able to cope with the necessary freight movements. Ford weighed these assurances, along with its established practices in strike situations, its knowledge of the current legal situation and concluded that the diversion would be prudent.

12. On or about May 27, 1960, Ford was notified that plaintiff and the Brotherhood had agreed to a court decision in their dispute. Being satisfied that it was then safe to restore routings, Ford sent a telegram on June 1, 1960, which restored all prior diversions.

13. On or about June 2, 1960, this Court (Judge Chilson) issued a preliminary injunction against the renewal or conduct of any new strike in the dispute.

14. On July 27, 1960, this Court (Judge Chilson) issued a permanent injunction. See Denver and Rio Grande Western RR Co. v. Brotherhood of Railroad Trainmen, 185 F. Supp. 369 (Dist. of Colo. 1960), affirmed 290 F.2d 266 (10th Cir. 1961), cert. den. 366 U.S. 966 (1961), rehearing denied 368 U.S. 873 (1961).

15. All of plaintiff's passenger and freight trains scheduled to operate on May 16, 1960, did in fact operate, although delayed. Plaintiff does not claim any damage or loss of business profits during the period of the strike on May 16, 1960, therefore the only question before this Court is the amount of damages, if any, sustained by the plaintiff between May 19, 1960, and June 1, 1960.

16. During this period, Ford Motor Company or its suppliers, diverted approximately 274 carloads that would otherwise have been shipped over the plaintiff's rails, resulting in a revenue loss to the plaintiff of about $89,743.38.

[fol. 80] 17. For the year 1960, plaintiff's expenses ran about 57.67% of its revenue figures, therefore if the plaintiff had transported the shipments in question it would have received a net profit of $37,988.37.

18. There was no mention during the trial of defendants B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter in this action under 28 U.S.C. §§1331 and 1337.

2. By calling and engaging in the strike of May 16, 1960, defendants failed to exhaust the remedies provided by Section 3, First (p) of the Railway Labor Act.

3. The action must be dismissed as to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens,

N. E. Doolittle and M. C. Feather, for failure to implicate these defendants in any way in the trial proceedings.

4. The union-authorized strike of May 16, 1960, was held to have been illegal by the decision of July 27, 1960, issuing the permanent injunction, but the threat of a renewed strike had persisted until June 2, 1960, when the preliminary injunction was issued by this Court (Judge Chilson).

5. The diversion of freight by the Ford Motor Company during the period of on or about May 19, 1960, to about June 1, 1960, was proximately caused by the existing threat of a strike and the failure to secure an injunction against such strike.

6. The diversion by the Ford Motor Company was a reasonable action based upon established practice and its knowledge of the legal situation surrounding the strike, specifically the knowledge that the restraining order of May 16, 1960, was issued ex parte and provided no assurance that an injunction would follow.

7. Plaintiff acted with due diligence and took all reasonable steps to mitigate its damages by keeping Ford informed as to the current legal situation regarding the strike.

[fol. 81] 8. Plaintiff has proven with sufficient certainty a loss of net business profits resulting from the diversion of shipments by Ford Motor Company during the period of May 19, 1960, through June 1, 1960, amounting to 42.33% of $89,743.38 or $37,988.37.

Judgment will be entered for the plaintiff and against the defendants Brotherhood of Railroad Trainmen and R. E. Carroll in accordance with these findings.

Plaintiff will promptly submit an appropriate form of Judgment.

Dated at Denver, Colorado this 8th day of March, 1965, A.D.

By The Court: Alfred A. Arraj, Chief Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT

ORDER OF JUDGMENT—Entered March 16, 1965

This case having come on for trial before the Court, sitting without a jury pursuant to waiver of a jury trial by the parties, and the Court having considered the pleadings, the testimony adduced, and the briefs and arguments of counsel; and

The Court having entered its findings of fact and conclusions of law herein on March 8, 1965,

It Is, Therefore, Adjudged And Ordered:

1. Judgment shall be entered in favor of the plaintiff, The Denver and Rio Grande Western Railroad Company, and against the defendants, Brotherhood of Railroad Trainmen and R. E. Carroll in the sum of Thirty-Seven Thousand Nine Hundred Eighty-Eight and 37/100 Dollars ($37,988.37) and costs to be hereinafter taxed on the filing of a Bill of Costs.

2. Judgment of dismissal shall be entered in favor of the defendants, B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather.

[fol. 82] 3. Execution upon this judgment shall be stayed for a period of thirty days from this date.

Dated at Denver, Colorado, this 16th day of March 1965.

By The Court: Alfred A. Arraj, Chief Judge, United States District Court.

Approved as to form: Philip Hornbein, Jr., Attorney for Defendants.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 13, 1965

Notice is hereby given that the Brotherhood of Railroad Trainmen and R. E. Carroll, above-named defendants in this cause, hereby appeal to the United States Court of Appeals for the Tenth Circuit the final order and judgment of the Court, dated March 16, 1965, entering judgment in favor of the plaintiff, The Denver and Rio Grande Western Railroad Company, and against the appellants-defendants, Brotherhood of Railroad Trainmen and R. E. Carroll, in the sum of Thirty-Seven Thousand Nine Hundred Eighty-eight and 37/100 Dollars ($37,988.37) and costs to be thereafter taxed.

Dated at Denver, Colorado, on this 13th day of April, 1965.

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Appellants-Defendants.

IN THE UNITED STATES DISTRICT COURT

STATEMENT OF POINTS OF APELLANTS-DEFENDANTS —Filed April 13, 1965

Pursuant to the provisions of Rule 75(b) of the Rules of Civil Procedure, appellants-defendants file this, their statement of points on which they intend to rely on the appeal in this action.

[fol. 83] 1. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants on the ground that it failed to state a claim against the appellants-defendants upon which the relief prayed for could be granted.

2. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants as to appellant-defendant Brotherhood of Railroad Trainmen on

the ground that venue does not properly lie in this judicial district under Title 28, Section 1391 of the United States Code.

3. The Court erred in failing to dismiss the complaint, as amended, on motion of the appellants-defendants on the ground that the action is barred by the applicable provisions of the Colorado Statute of Limitations, Chapter 87, Article 1, Section 7 of the Colorado Revised Statutes.

4. The Court erred in failing to dismiss Count II of the complaint, as amended, on the ground that the Court does not have jurisdiction over the subject matter of such Count.

5. The Court erred in the conclusions in paragraph 4 of its Conclusions of Law holding that the threat of a renewed strike had persisted until June 2, 1960, when a preliminary injunction was issued by this Court in that such conclusions are contrary to the law and the evidence of record.

6. The Court erred in the conclusions in paragraph 5 of its Conclusions of Law in that such conclusions are based upon hearsay evidence and are contrary to the law and the evidence of record.

7. The Court erred in the conclusions in paragraph 6 of its Conclusions of Law in that such conclusions are based upon hearsay evidence and are contrary to the law and the evidence of record.

8. The Court erred in the conclusions in paragraph 7 of its Conclusions of Law in that such conclusions are contrary to the law and the evidence of record.

9. The Court erred in not including in its Conclusions of Law the proposed findings set forth in paragraph 2 of defendants' proposed conclusions of law, reading as follows:

> [fol. 84] "None of the defendants are liable in damages for any diversion of shipments from the lines of the plaintiff Railroad by shippers during the period May 19, 1960, through June 1, 1960, because of a future

threatened strike by the Brotherhood over the plaintiff's failure to comply with Awards Nos. 19389 and 19372 of the National Railroad Adjustment Board since such strike would have taken place only if this Court had dissolved the restraining order against the defendant Brotherhood and denied plaintiff's request for injunctive relief. Such a strike would have been a lawful strike. Plaintiff is not entitled to damages for diversion of shipments based upon the threat of a lawful strike."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

10. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 3 of defendants' proposed conclusions of law, reading as follows:

"None of the defendants are liable in damages for any claimed loss of business profits resulting from the strike of May 16, 1960, because such strike in part was provoked by the carrier's refusal to accept the interpretation of the collective bargaining agreement between the Brotherhood and the plaintiff set forth in Award No. 19389. While the plaintiff had a legal right under Section 3, First (m) of the Railway Labor Act to refuse to pay the money award involved in such decision, it did not have the legal right to refuse to put into effect the contract interpretation involved."

Defendant's proposed conclusions of law are in accord with the applicable law and the evidence of record.

11. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 4 of defendants' proposed conclusions of law, reading as follows:

"In any event, the plaintiff has not proved with the certainty required by law the amount of loss of business profits from the diversion of shipments by shippers

over the lines of the plaintiff during the period May 19, 1960, through June 1, 1960. The claimed loss of revenue from this source is uncertain. Moreover, the plaintiff has not sustained its burden of showing with reasonable certainty the amount of such loss because it has [fol. 85] failed to show that it did not save from wages not paid to employees during the period of the strike on May 16, 1960, a sum greater than any claimed loss of business profits from diverted shipments."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

12. The Court erred in not including in its Conclusions of Law the findings set forth in paragraph 5 of defendants' proposed conclusions of law, reading as follows:

"Finally, the defendant Brotherhood and Mr. R. E. Carroll cannot be held liable for damages for any claimed loss of business profits growing out of diversion of shipments over the lines of the plaintiff for the period of May 19, 1960, through June 1, 1960, because the plaintiff did not promptly and properly inform the shippers of the legal situation which would assure a continuance of plaintiff's services. In addition, plaintiff did not promptly inform said shippers of the agreement reached on May 26, 1960, in the proceedings before this Court for a continuance of the restraining order until this Court acted upon plaintiff's request for relief, thus assuring the continuance of plaintiff's services until the issue of whether or not the Brotherhood could conduct a strike was litigated in this Court. Plaintiff has thus not discharged its duty of taking all reasonable steps to mitigate the damages claimed. Any diversion of shipments which took place as a direct result of this failure by the plaintiff."

Defendants' proposed conclusions are in accord with the applicable law and the evidence of record.

13. The court erred in the findings in paragraph 8 of its Findings of Fact to the effect that all employees of the plaintiff represented by the Brotherhood withdrew their services from the plaintiff on May 16, 1960, in that the evidence of record shows that only some of such employees withdrew their services.

14. The Court erred in the findings in paragraph 10 of its Findings of Fact in that such findings are based upon hearsay evidence improperly admitted into the record and are contrary to law and the evidence of record.

[fol. 86] 15. The Court erred in the findings in the second sentence of paragraph 11 of its Findings of Fact in that such findings are based on hearsay evidence improperly of record and contrary to law and the evidence of record.

16. The Court erred in the findings in the second sentence of paragraph 12 of its Findings of Fact in that such findings are based on hearsay evidence improperly of record and contrary to law and the evidence of record.

17. The Court erred in the findings in paragraph 16 of its Findings of Fact in that such findings are based upon hearsay evidence improperly of record and are contrary to the law and the evidence of record.

18. The Court erred in the findings in paragraph 16 of its Findings of Fact for the additional reason that it included therein 62 carloads of outbound shipments from the Milpetas, California, plant of Ford Motor Company, which the evidence of record shows were immediately balanced off by the shipment over the lines of the plaintiff railroad from that plant of 62 cars of shipments which would have otherwise been routed over the Southern Pacific lines. There was thus, as a matter of law, no injury at all to the plaintiff with respect to such shipments.

19. The Court erred in the findings in paragraph 17 of its Findings of Fact in using plaintiff's expense figures for the entire year 1960 instead of figures for the month of May 1960 when the subject matter of the complaint and the shipments involved took place.

20. The Court erred as a matter of law in not including in its Findings of fact the facts shown by the evidence of record that the plaintiff paid only that portion of its employees during the period of the strike on May 16, 1960, who were called for duty and were not used.

21. The Court erred in not including in its Findings of Fact the facts shown by the evidence of record that the Ford Motor Company did not consult with the Brotherhood with respect to the Brotherhood's future intentions for the period May 16, 1960, through June 1, 1960.

[fol. 87] 22. The Court erred in failing to include in its Findings of Fact the fact that the plaintiff did not promptly and properly inform the Ford Motor Company of the legal situation prevailing with respect to a strike threat after May 16, 1960, and that the plaintiff did not promptly inform the Ford Motor Company of its agreement made in open Court with the Brotherhood on May 26, 1960, that the restraining order could remain in effect until the Court had acted upon the plaintiff's request for injunctive relief.

23. The Court erred as a matter of law in its conclusion that judgment should be entered for the plaintiff and against defendants Brotherhood of Railroad Trainmen and R. E. Carroll in accordance with the Court's findings of March 8, 1965.

24. The Court erred as a matter of law in not entering judgment for the defendants Brotherhood of Railroad Trainmen and R. E. Carroll and against the plaintiff.

Respectfully submitted,

Philip Hornbein, Jr., James L. Highsaw, Jr., Attorneys for the Appellants-Defendants.

[A supersedeas bond was filed April 14, 1965.]

IN THE UNITED STATES DISTRICT COURT

Official Transcript

Proceedings before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, beginning at 9:00 o'clock a.m., on the 3rd day of December, 1964, in Courtroom A, Main Post Office Building, Denver, Colorado.

APPEARANCES: Walter J. Cummings, Jr., Kenneth D. Barrows, T. A. White, appearing for the Plaintiff; James L. Highsaw, Philip Hornbein, Jr., appearing for the Defendants.

[fol. 88] The Court: Case 7800, Denver and Rio Grande Western Railroad versus Brotherhood of Railroad Trainmen. Mr. Barrows and Mr. Cummings for the plaintiff; Mr. Highsaw and Mr. Hornbein for the defendants. Are you ready, gentlemen?

Mr. Cummings: Yes, Your Honor.

Mr. Highsaw: Yes, Your Honor.

The Court: All right, you may proceed.

Mr. Cummings: If the Court please, you will recall that this is a class action against the Brotherhood of Railroad Trainmen and its members for damages suffered by the D&RG Western during a strike and other proceedings that were held to be illegal that occurred on May 16, 1960 and lasted approximately the evidence will show nine hours.

The first notice of the strike came in April of that year. The actual strike took place on May 16th, as I said, and the pretrial order admits the strike was authorized by the President of the Railroad Trainmen.

At the pretrial conference before Judge Doyle, the defendants admitted that Judge Orie Phillips had passed on the various defenses asserted by the defendants so that they will not be argued again today to Your Honor, except, of course, they are preserved in case of any appeal, so that the only matter before Your Honor today is the

amount of damages incurred by the Denver and Rio Grande.

Before calling any witnesses, Your Honor, we would like to check this morning to see whether the court reporter attached to Mr. Crawford's deposition, which is under seal, the four exhibits that were tendered at that deposition. If not, I am going to have copies of those exhibits marked.

The Court: No exhibits are apparently attached to this.

Mr. Cummings: Very well, Your Honor, I will ask the Clerk to mark them.

(Plaintiff's Exhibits 4, 5, 6 and 7 were marked for identification.)

[fol. 89] The Court: What numbers are you putting on there?

The Clerk: 4, 5, 6 and 7.

Mr. Cummings: 1 and 2 are already filed.

The Court: Yes, I have those.

Mr. Cummings: And Exhibit 3 we have just had marked this morning and it has not been introduced yet. It is a compilation.

The Court: All right.

(Plaintiff's Exhibits 8, 9 and 10 were marked for identification.)

Mr. Cummings: Would Mr. Carroll take the stand, please?

Mr. Highsaw: Mr. Carroll is not here yet.

Mr. Cummings: You said he would be.

Mr. Highsaw: Yes, I promised to have him available today. I am not sure why he isn't here at this particular moment, but I assure you he will be here before the day is over.

(Counsel conferred.)

Mr. Highsaw: Mr. Cummings, we just sent somebody to call Mr. Carroll to make sure there wasn't any misunderstanding.

Mr. Cummings: All right, I will call Mr. Crawford then.

The Court: Does the defendant agree that the only matter at issue at this time is what damages if any the plaintiff is entitled to?

Mr. Highsaw: Yes, we concede, Your Honor, that the only evidence here that has to be presented at this time is bearing on the question of damages.

With respect to counsel's statement that Judge Phillips passed on all our defenses, I would like to qualify that by saying what he passed on was what we put in our mo-[fol. 90] tion to dismiss and we are not waiving those defenses, of course. We just assume Your Honor doesn't want them to be relitigated this morning.

The Court: Yes, they would be the law of the case as far as the Court is concerned.

Mr. Highsaw: And we are proceeding from there and the only thing to be tried factually is the damages.

The Court: Well, do you gentlemen wish to make opening statements?

Mr. Cummings: I have made all I want to. Perhaps Mr. Highsaw wants to.

The Court: Just be seated, Mr. Crawford, and give Mr. Highsaw an opportunity to make his opening statement.

Mr. Highsaw: Your Honor, I have a very brief trial memorandum, which doesn't go into the evidence, of course. It is on our legal position with respect to the damages, which I would like to present to the Court.

The Court: All right.

Mr. Highsaw: I would like to note that Mr. Carroll is in the courtroom now, Your Honor. It is our position that the plaintiff suffered no actual monetary loss as a direct and proximate result of the strike. The losses that they suffered were uncertain and speculative, that at least to some extent the record shows the claimed losses were subsequently made up by shippers and that the claimed sses do not take into account savings incurred by the carrier in the form of wages not paid during the strike itself on May 16, 1960.

The plaintiff's claim of losses as shown by the answers to the interrogatories which the defendant submitted is

based solely on the claim of loss of revenue from freight shipments which the plaintiff alleges were diverted from the Denver and Rio Grande Railroad at periods of time after the strike was over, beginning several days after the strike was over, running from approximately May 19th through about June 1st of 1960.

[fol. 91] It is the position of the defendant, Your Honor, that even if the plaintiff should establish these diversions that the defendants are not legally liable for the claims with respect thereto; that in the absence of evidence that the defendants directly instigated and caused such diversions, it is our position that the diversions were caused by reason of the anticipation of shippers that there might be a strike occur after May 16, 1960, if this Court should dissolve the restraining order which was then in effect and should not grant a permanent injunction against the strike.

They were therefore relying on a threat which was a legal threat because if there was a threat of a strike after May 16, 1960 it was a threat that was premised on the condition that it would be a legal strike because it could not take place unless the court found the defendants had a right to strike and dissolved the restraining order which was then in effect, and it is our position that the losses which are claimed are not the direct and proximate result of the strike itself.

We also have the legal position that while loss of business profits may be recovered in this Circuit arising out of interruptions to business that they must be clearly proved and be reasonably certain and not merely conjectural.

And, our legal position with respect to the damages, Your Honor, is that at the time the strike in question occurred, there had been some thirty years of operation under the Railway Labor Act. No court up to that had held that it was improper or unlawful for a railway labor organization to conduct a strike for the purpose of enforcing Adjustment Board Awards and that the defendants'

action of May 16, 1960 was in complete good faith, was under color of legitimate purpose and in circumstances where the railroad was at least partially in error and blame.

This is shown by the fact that this Court and the Court of Appeals sustained the validity of the Adjustment Board decision in Case 7348 with respect to the interpretation of the contract which the carrier had refused to recognize and which had been one of the reasons for the invocation of the strike on May 16, 1960.

Basically, that's our position, Your Honor.

[fol. 92] The Court: All right. Mr. Carroll is here now, Mr. Highsaw announced.

Mr. Cummings: Before calling Mr. Carroll, I would just like to comment that some of the matters Mr. Highsaw was arguing to the Court we believe have been passed upon by Judge Phillips and as far as the fact that the plaintiff might have been compensated by shippers by restoring business previously lost, this, of course, is a tort case, and under the Grayson case of the Tenth Circuit, which I will mention later on, it is immaterial whether or not a plaintiff is made whole or compensated by a third party. It would be different if it were a contract case.

Mr. Carroll, would you take the stand, please?

RICHARD E. CARROLL called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Mr. Carroll, would you please state your name and address and position?

A. Richard E. Carroll, 720 Kittridge Building, Denver, General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW.

Q. Did you occupy that position back in May of 1960, when the strike involved in this case took place?

A. I did.

Q. Did you also occupy that position in April of 1960 when the strike was first threatened?

A. Yes.

Q. Are you familiar with the fact that the National Mediation Board intervened in this matter in May of 1960?

A. Yes.

Q. What caused them to intervene, Mr. Carroll?

A. If I recall correctly, the carrier invoked mediation.

Q. What caused the carrier to invoke mediation? Was there a strike threat?

A. Yes, we had pre-set a strike.

Q. And you advised the National Mediation Board?

A. Yes.

Q. And they in turn advised the carrier? Isn't that true, on or about May, 1960?

A. I think that's true.

Q. Was the mediation successful?

A. No, it was not.

Q. And after the mediation terminated, what took place?

A. We set another strike then.

[fol. 93] Q. Was that to be effective May 16, 1960?

A. That's right.

Q. And was that authorized by the President of the Brotherhood of Railroad Trainmen?

A. It was.

Q. What time on May 16, 1960 did the strike commence?

A. As I recall, it was set for 2:00 p.m.

Q. That is when it started, is it not?

A. Yes.

Q. And how long did it last in the Denver area to the best of your knowledge?

A. Well, that's rather hard to say. As I recall it, we began to issue instructions calling off the strike about 6:30 to 7:00 p.m., and, of course, it takes time to get those notices out to these different people and get in contact with

them, but we did that just as quickly as we possibly could through telephoning and sending the telegrams.

Q. To refresh your memory, was the restraining order issued on or about 7:00 p.m. on that date?

A. Yes, I believe it was.

Q. So it would have taken sometime for the strike to stop thereafter, would it not?

A. That's right.

Q. Would it be fair to say, as the railroad did in its answers to your interrogatories, that the strike in Denver did not cease until about 8:30 p.m. that evening?

A. I believe that would be about correct.

Q. At Salt Lake, could you tell us how long the strike lasted?

A. I can't say definitely. I believe it was a little later though there than it was in Denver due to the fact we had to get telegrams to these people and our representatives in that area and also the difficulty in contacting them long distance.

Q. Would it refresh your memory, Mr. Carroll, if I show you Plaintiff's Exhibit 8 for identification, which is the "Trainmen's News" of May 30, 1960, and ask you to read the righthand column?

Mr. Highsaw: Just a moment. (Counsel examining exhibit.)

By Mr. Cummings:

Q. I would like you to read aloud, please, the fourth paragraph.

The Court: Just a moment, Mr. Cummings. It is our practice or at least my practice, that exhibits not be read into the record unless they are received in evidence.

Mr. Cummings: Very well, I would like to move that this exhibit be received in evidence, Your Honor.

[fol. 94] Mr. Highsaw: Your Honor, I am going to object. I have no objection to that particular paragraph being read into the evidence but—

Mr. Cummings: Well, that would satisfy us.

The Court: All right.

Mr. Highsaw: This document hasn't been served on us in connection with this case.

The Court: All right, then we will proceed on that basis, that it may be read.

Mr. Highsaw: I understand he wanted one small paragraph.

Mr. Cummings: That's correct.

A. "A restraining order was handed down by the U.S. District Court, Denver, at 7:00 p.m., and the B. of R.T. immediately issued instructions to have the picket lines withdrawn from the various terminals. This was accomplished by 10:00 p.m."

Q. So would you say the strike lasted at least until 10:00 p.m. in the Salt Lake area?

A. I would imagine about that time.

Cross examination.

By Mr. Highsaw:

Q. Mr. Carroll, you mentioned when the restraining order was received, you sent out notices immediately. What form did these take, letters, telegrams or telephone calls?

A. Telegrams and long distance telephone calls. Local calls in Denver.

Q. Did you proceed immediately upon receipt of the restraining order to do this?

A. Yes, sir.

Q. Did you at any time thereafter send out any strike notice or request a strike in connection with this matter?

A. After that time?

Q. After that.

A. No, sir.

Mr. Highsaw: That's all.

The Court: You may step down, Mr. Carroll.

[fol. 95] Mr. Cummings: Mr. Crawford, please.

HENRY P. CRAWFORD called as a witness by the Plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you give your name and address?

A. Henry P. Crawford, The American Road, Dearborn, Michigan, Ford Motor Company.

Q. What is your position at the Ford Motor Company?

A. I am Manager of Traffic Analysis Reporting to the Director of Traffic and the Vice President of Purchasing.

Q. Did you occupy that position in May of 1960?

A. I did.

Q. Did you previously give a deposition at the request of the Brotherhood of Railroad Trainmen on March 6, 1964?

A. I did.

Q. Showing you a Mailgram, which was made Exhibit 1 by Mr. Highsaw at your deposition, and which your—

Mr. Highsaw: Your Honor, I object to any references to the deposition. I didn't mind establishing on the record the deposition was taken, but the witness is here and he is testifying and unless they want to use the deposition to impeach him, I don't believe it is proper for counsel to make reference to the deposition.

The Court: All right, have it marked here.

Mr. Cummings: It has been.

The Court: All right, I will sustain the objection to the reference to the deposition at this point. If it becomes necessary to refresh his memory or impeach, then it may be used, reference to the deposition may be used.

By Mr. Cummings:

Q. Showing you Plaintiffs' Exhibit 4 for identification which purports to be a Mailgram from J. J. Ward to Messrs. Morcom, Knutson, Stevens and Rea, are you familiar with that document? Have you seen it before?

A. I have.

Mr. Cummings: I would like to offer that in evidence, Mr. Highsaw.

[fol. 96] Mr. Highsaw: I object on the grounds, Your Honor, that the document shows on its face it was sent by Mr. J. J. Ward and not by this witness and it is hearsay evidence.

The Court: Well, the objection is sustained at this time. The only identification has been that he has seen it. Possibly he knows more about it than that. I don't know.

By Mr. Cummings:

Q. Are you familiar with the Mailgram?

A. I am.

Q. As part of your duties which you described to the Court, were you familiar with that Mailgram at that time?

A. I was, sir.

Mr. Cummings: On that basis we think it is admissible and as I said it was marked as an exhibit at Mr. Crawford's deposition by Mr. Highsaw and used in interrogating him in the deposition.

Mr. Highsaw: Your Honor, in the first place, the deposition was purely for purposes of discovery and the fact that it was involved in the deposition does not make it valid for evidence at this time.

Secondly, there has been no proper foundation laid that this witness knows of his own personal knowledge that this document was actually sent and it still has not been established that his knowledge about that Mailgram is anything other than knowledge that he has gained from other people and consequently it is hearsay.

By Mr. Cummings:

Q. In the course of your business at the Ford Motor Company, did you learn that this Mailgram was sent?

A. Yes, I did.

Mr. Cummings: We think that a sufficient foundation has been laid, Your Honor.

The Court: Well, I assume that Mr. Highsaw's objection continues. Does it, Mr. Highsaw?

Mr. Highsaw: That's correct, Your Honor.

The Court: I must sustain it on the showing that has been made so far that there has not been a proper foundation to accept the exhibit in evidence.

[fol. 97] By Mr. Cummings:

Q. Mr. Crawford, on or about May 18, 1964, did the Ford Motor Company send a Mailgram to various members of its Traffic Department?

Mr. Highsaw: I object to that.

Mr. Cummings: I am asking for his personal knowledge.

Mr. Highsaw: Well, he is asking whether the Ford Motor Company—the Ford Motor Company consists of a great many people. If he wants to ask him whether he personally sent a Mailgram, I have no objection, but he can't ask him a question whether the Ford Motor Company did.

Mr. Cummings: Well, he was a member of the Traffic Control Department. I will restrict the question to that.

By Mr. Cummings:

Q. Did the Traffic Control Department to your knowledge send a Mailgram on or about May 18, 1960?

Mr. Highsaw: I will still object to that in that the Traffic Control Department obviously consists of a number of people. It is still not limited to personal activities and any knowledge of this witness other than what he gained by hearsay.

The Court: Do you represent, Mr. Cummings, that this witness has the care, custody and control of the record that you have had marked as Exhibit 4?

Mr. Cummings: We will ask him.

By Mr. Cummings:

Q. Do you have custody of such records, Mr. Crawford?

A. In the normal course of our record keeping one of my assignments is such record keeping. Specifically, I received a copy of this telegram at the time it was originated.

The Court: I suggest you find out if this particular document was sent.

Mr. Cummings: I wasn't going to go any further on that. I thought you overruled it. Would you read the last question that was objected to by Mr. Highsaw to the witness? [fol. 98] The Reporter: "Did the Traffic Control Department to your knowledge send a Mailgram on or about May 18, 1960?"

By Mr. Cummings:

Q. Was such a Mailgram sent on or about May 18, 1960, to Messrs. Morcom, Knutson, Stevens and Rea to your personal knowledge?

A. Yes, sir, to my personal knowledge, and I received the copy that was addressed to Mr. Knutson.

Q. Did that Mailgram concern the threatened strike on the Denver and Rio Grande?

Mr. Highsaw: I object on the ground the best evidence would be the Mailgram itself, and it has not been admitted in evidence.

By Mr. Cummings:

Q. What knowledge did you acquire personally of this strike, Mr. Crawford, on or about May 18, 1960?

Mr. Highsaw: I object without a foundation being laid as to how he acquired the knowledge and where.

The Court: Your objection on the grounds stated is overruled, but I think counsel is asking leading questions. I thing the proper approach would be to ask him if on or about the date you are concerned about he had any knowledge of any strike and tell what knowledge he has.

Mr. Cummings: Very well, I will be glad to abide by that advice, Your Honor.

By Mr. Cummings:

Q. On or about May 18, 1960, did you have any knowledge of a strike on the Denver and Rio Grande?

A. I had such knowledge. The knowledge consisted of a collection of telephone conversations with the persons in Ford Company involved with such strikes and as well as the representatives of the Rio Grande in the Detroit offices, and in general a careful watching of the areas, trade journals, newspapers and so on that bring these subjects to bear normally.

Q. What if anything did you or your department do about the strike?

Mr. Highsaw: I object to the part of it that deals with his department.

By Mr. Cummings:

Q. Well, to your personal knowledge, what was done by your department with respect to the strike?

[fol. 99] The Court: He may answer this question.

A. The Traffic Office issued instructions to a Mr. J. J. Ward to in turn list the principal origin or shipping plants of the companies as well as certain key suppliers to divert such traffic that would normally move over the Rio Grande routings to alternate routings. Mr. J. J. Ward then under our direction invented or developed alternate routings off the Rio Grande and issued the wire that is in question here.

Mr. Highsaw: I move that answer be stricken on the grounds it is hearsay.

The Court: The motion will be denied.

By Mr. Cummings:

Q. When if at all were any routing instructions given by your department that would remove the Rio Grande from Ford business?

A. I will refresh my memory.

Mr. Highsaw: Your Honor, so as to simplify things, may I have a continuing objection to all questions which are directed to what the witness' department did as distinguished from what the witness himself did?

Mr. Cummings: May I ask the witness to testify only of his own personal knowledge?

The Court: Yes, the objection may be continuing, but you will please follow the suggestion that counsel has made that you just testify to matters within your own personal knowledge, Mr. Crawford, please.

A. (Continued) My copy of this telegram is dated May 18, 1960.

Q. And as a result of that telegram did Ford divert any business from the Rio Grande?

A. We did.

Q. For approximately what period?

A. The same Mr. J. J. Ward, with a copy to me, issued a countermanding telegram dated June 1, 1960, restoring the normal routings of the Rio Grande.

Q. Showing you Plaintiff's Exhibit 6 for identification, is that the telegram you have just referred to?

A. Yes, sir, it is.

Mr. Cummings: I would ask that it be received in evidence.

[fol. 100] Mr. Highsaw: My objection as to Exhibit 6 is the same as I stated my objection to Plaintiff's Exhibit 4, Your Honor. Again, it is a document signed by Mr. J. J. Ward, wasn't issued by this witness, this witness' knowledge was acquired from other people, and it is hearsay.

By Mr. Cummings:

Q. Did you personally receive a copy of that telegram?

A. I did, sir.

The Court: Well, who directed the issuance of it, if you know?

The Witness: We act in substance as a committee, with the Director of Traffic, myself and Mr. Ward's immediate superior acting as a body of three, and such routings and changes are issued, so I could say jointly this decision was arrived at.

The Court: Did you participate in the making of the decision?

The Witness: I did.

The Court: Does the letter represent the decision of the committee you referred to?

The Witness: Yes, sir.

The Court: The exhibit will be received.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

By Mr. Cummings:

Q. Is that true also of Plaintiff's Exhibit 4 of May 18, 1960? Is that a committee decision in which you participated?

A. Yes, sir, identical circumstances.

Mr. Cummings: For the same reason, Your Honor, we think it should be received, at this point.

The Court: Which one is that?

Mr. Cummings: That is the Mailgram.

[fol. 101] The Court: All right, I think the foundation has now been properly laid for the reception of the Mailgram. I don't recall the number.

Mr. Cummings: That is Plaintiff's Exhibit 4.

The Court: 4 will be received and 6 will be received.

(Plaintiff's Exhibit 4 for identification was received in evidence.)

By Mr. Cummings:

Q. After this strike occurred, at any time did you cause to be prepared a list of cars that Ford diverted from the

Denver and Rio Grande Railroad because of the threatened strike in May and June of 1960?

A. We did prepare such a listing.

Q. Showing you a copy of Plaintiff's Exhibit 5 for identification, I will ask you if that isn't such a list?

A. That is the list.

Q. That was prepared under your direction and control, is that true, Mr. Crawford?

A. Yes, sir.

Q. And it was based on documents in Ford's possession?

A. Yes, sir.

Mr. Cummings: I will move the receipt of this document in evidence.

Mr. Highsaw: Which exhibit is this, now?

Mr. Cummings: Exhibit 2 at his deposition. It is Exhibit 5 here.

Mr. Highsaw: Your Honor, I object to the receipt of this document in evidence. It purports to show the diversions, purports to show what happened to shipments which left the Ford plant in Philadelphia, a Ford plant in Chicago Heights, the Eaton Manufacturing Company in Cleveland, a Ford plant in Monroe, the Warner Gear of Muncie, Indiana Corporation, the Ford plant at Sterling and Ford plant in Rouge.

Now, unless foundation is laid that this witness personally directed these alleged diversions and had personal knowledge that they occurred at the time and not based upon some document that he says generally was in the possession of the Ford Motor Company, I would object to its receipt in evidence.

[fol. 102] By Mr. Cummings:

Q. Mr. Crawford, was this document in question prepared in the course of your business from records in Ford's control?

A. They were.

Mr. Cummings: Well, Your Honor, we think that sufficient foundation has been laid.

Mr. Highsaw: The witness still hasn't shown who prepared this document.

Mr. Cummings: I asked whether it was prepared under his direction and control and he answered yes.

Mr. Highsaw: Well, that still doesn't show who prepared the original documents. Obviously the original documents had to come from Philadelphia, Chicago Heights, Cleveland, Monroe, Sterling and Rouge, and it doesn't show who prepared those and how or on what basis, whether the managers of those plants gave the information or whether it was some shipping clerk or what.

The Court: Well, it might be helpful to the Court in ruling on this matter if you will have the witness outline the procedure that is followed by his department in determining where shipments or how they will be routed from Rouge or Sterling or from these other plants.

Mr. Cummings: Yes, surely.

By Mr. Cummings:

Q. Would you do that?

A. Yes, sir, as a regular course of our management of rail routing and shipments, when instructions of the types we have seen here are issued to various shippers we then follow up to see that such instructions are carried out. We do this in two ways. The first is a review of a so-called shipping deviation form, which is a standard form of the company which all shipping locations are asked to execute whenever they route a rail car over a so-called abnormal routing. It might be abnormal for any number of reasons. In this case it would be construed as abnormal because it was a specific instruction. The second check we have, and this would apply to this particular exhibit, is an actual gathering of freight bills that were paid showing the railway routing. This ties the instructions, the shipping report form and the actual

payment of charges together into one common point, specifically my office, and people under my supervision from those sets of documents prepared this summary.

[fol. 103] The Court: I believe a foundation has been laid. The exhibit will be received.

(Plaintiff's Exhibit 5 for identification was received in evidence.)

Mr. Highsaw: May I make a statement for the record?

The Court: Do you care to examine the witness on voir dire?

Mr. Highsaw: No, I just want to make a statement.

The Court: All right.

Mr. Highsaw: It is our position, Your Honor, that the best evidence on what the witness is testifying about is the deviation form he is talking about, the bills of lading themselves, the forms which they used. This is merely a conclusionary document based on those and the actual foundation evidence is not before the Court, and on that basis we would have a continuing objection.

The Court: I think it could be treated as a summary.

Mr. Cummings: That's what it was meant to be, a compilation.

The Court: Yes.

By Mr. Cummings:

Q. Mr. Crawford, as the result of your study in the course of your business, did you personally learn how many cars had been diverted by the Ford Motor Company from the Denver and Rio Grande during the period in May and June of 1960 that's in question here?

A. Yes, sir, by the counting of the two sets of source documents we arrived at a total number of carloads.

Q. How many was that, if you recall?

A. Our count from this summary indicated that there were 118 carloads of automotive parts and a subsequent study 94 carloads of assembled vehicles, totaling 212 carloads in all.

Mr. Highsaw: Your Honor, so I won't be continuously objecting, may I have a continuing objection to any testimony of any kind based on these underlying documents which are not before the Court?

[fol. 104] The Court: Yes, the record may so reveal.

By Mr. Cummings:

Q. Showing you Plaintiff's Exhibit 7 for identification—Mr. Highsaw, this was Exhibit 4 at the deposition, it is Plaintiff's Exhibit 7 for identification here—I will ask you if that document was prepared in a similar fashion to the documents that we have just been discussing, namely Plaintiff's Exhibit 5?

A. Slightly different. We do not perform this report of shipping deviation on assembled vehicles, which this document is concerned with. We instead took the freight bills, as I mentioned as the second method used in the other exhibit, so the freight bill summary was all that was used in this exhibit. It was the actual documents from which the bills were paid.

Q. That is a compilation of the freight bills then in your possession?

A. Yes.

Mr. Cummings: For the reasons given with respect to the previous exhibit, we offer Plaintiff's Exhibit 7, Your Honor.

Mr. Highsaw: Your Honor, I would like to object to the exhibit on the grounds I have previously stated. Before you rule on it, I would like to have permission to voir dire the witness at this point.

The Court: All right, you may.

Voir dire examination.

By Mr. Highsaw:

Q. Mr. Crawford, these freight bills which you are talking about in your possession, are they in your personal possession or are they simply in the office?

A. My personal possession. I personally touched every single one of them.

Q. Have you looked at every one of the freight bills that represent the numbers in this Plaintiff's Exhibit 7?

A. In touching them, I certainly looked at them.

Q. You read every one of them?

A. Yes, sir.

Mr. Highsaw: That's all, Your Honor.

The Court: I do not believe you have established with reference to this exhibit, Mr. Cummings, whether or not it was prepared under his direction.

[fol. 105] Mr. Cummings: Well, I did ask the general question whether it was prepared in the same way as Plaintiff's Exhibit 5, but I will ask the specific question.

Direct examination (continued).

By Mr. Cummings:

Q. Mr. Crawford, was it prepared under your direction?

A. One of my employees prepared this exhibit from the freight bills.

Q. Did you personally verify its accuracy?

A. To the extent of my human ability, yes, sir, I did.

The Court: The exhibit will be received.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

By Mr. Cummings:

Q. And does that exhibit cover the additional 94 cars that you testified to that were diverted from the Rio Grande during this period?

A. This covers carloads from the Wixom assembly plant near Detroit generally en route to Milpitas, California.

Mr. Highsaw: Just so the record is absolutely clear, we have a continuing objection technically related to this

other exhibit. I would like the record to show I have a continuing objection to any testimony based on this exhibit also.

The Court: The record may so show.

By Mr. Cummings:

Q. Whose company does the Wixom plant belong to?

A. The Ford Motor Company.

Q. How about the Milpitas plant you mentioned?

A. The Ford Motor Company.

Q. And does this document, Plaintiff's Exhibit 7, represent the 94 cars that you testified a few minutes ago were additionally diverted from the Rio Grande during the May-June, 1960 period we have been discussing?

A. To the extent human failings permit, that is a correct statement.

Q. Now, from your personal knowledge as a member of this committee that you testified about, do you personally know whether or not the Ford Motor Company in this May-June, 1960 period had any policy to try to make carriers whole for business that was lost to them during strikes?

[fol. 106] A. Let me qualify first our definition of policy. A traffic policy of the Ford Motor Company can only be one that is written and in the Traffic Policy Manual of the company. The term "policy" sometimes is loosely applied to other practices that we engage in, but there is no policy to the effect that counsel inquires.

Q. Well, in connection with the Rio Grande strike in question, did the Ford Motor Company adopt a policy to try to give back to the Rio Grande any business it had lost?

A. We did not adopt any such policy and no such routings made by this group from the Midwest to Milpitas. Neither was such makeup or restitution attempted to the assembled vehicles from Wixom, Michigan.

Q. Now, in the course of your business, did you learn whether the Ford Motor Company at Milpitas had diverted

any carloads from the Rio Grande to other shippers during this strike and the period thereafter?

A. I have so learned and I understand from a deposition that there was.

Mr. Highsaw: I object.

The Court: Objection sustained.

By Mr. Cummings:

Q. I only want your personal knowledge, whether you personally know of any cars that were diverted or—

A. I believe you said diverted. I believe you mean restored.

Q. No, diverted from the Rio Grande from your West Coast plant.

A. Oh, indeed, I have. I misunderstood you the first time. We have the freight bills and the same set of documents I referred to earlier.

Q. If you know, how many cars do those documents show were diverted from Milpitas?

A. I believe it was in the area of 60 or 61 carloads of automobiles.

Mr. Highsaw: Your Honor, since we are now off Exhibit 7 and into another area, I would like to continue my objections to this line of testimony on the grounds that it is based on hearsay.

The Court: Well, I am going to sustain the objection to this last questioning. I don't think a foundation has been laid and there have been no exhibits submitted with reference to this. Now, it is my understanding that this witness worked in the Dearborn area.

[fol. 107] Mr. Cummings: Yes, I will try to lay a foundation to satisfy you, Your Honor.

The Court: All right.

By Mr. Cummings:

Q. Was the traffic policy and routing of the Ford Motor Company under the supervision of the head office at Dearborn?

A. Yes, sir.

Q. So any decisions that were made at Milpitas would be taken in consultation with Dearborn, is that true?

A. Not necessarily.

Q. In this particular case, were there any consultations between Milpitas and Dearborn about diversion?

A. There were none with this committee I referred to, and to clarify I am referring to automobiles shipped in box cars from Milpitas to points east. Such diversions were made under the normal autonomy in an emergency of our traffic manager at Milpitas.

Mr. Highsaw: Objection, Your Honor.

The Court: Well—you made an objection?

Mr. Highsaw: Yes.

The Court: Well, this merely—what are you objecting to?

Mr. Highsaw: He stated diversions were made at Milpitas, as I understood it.

The Court: He said they were made at the direction of the officer at Milpitas.

Mr. Highsaw: That's right, and I would say this is hearsay. Not at the direction of this committee.

The Court: Well, I think this helps you. This is the reason I can't understand your objection. Unless something further develops with reference to his knowledge, I am not going to permit this testimony in.

Mr. Highsaw: All right, I will withdraw that objection.

The Court: All right.

[fol. 108] By Mr. Cummings:

Q. Would you tell the Court please, Mr. Crawford, what if any supervision and control was exercised by your office in Dearborn over the Milpitas traffic office?

A. We normally control all movements from Milpitas of this type. We also normally have standing instructions with the local traffic management throughout the country for that matter to exercise judgment superior to ours based

on the local considerations. Subsequently this diversion occurred and we have recovered the freight bills and summarized these.

Q. Have you personally in Dearborn or somebody personally in Dearborn under your supervision and control examined these freight bills in order to determine that 62 box cars had been diverted by Milpitas from the Rio Grande?

A. No, sir, we directed Mr. McCown, our traffic manager at Milpitas, to perform that survey. .

Q. Did he send the survey to you?

A. No, sir.

Q. Were the freight bills sent to Dearborn?

A. To the best of my knowledge, they are there now. They may not have been awhile ago. Our normal practice is to send all freight bills to Dearborn.

Q. But, at any rate, you did not make a personal study of the freight bills, learning this diversion had taken place?

A. I didn't.

Q. During this May-June, 1960 period, did the Rio Grande endeavor to persuade Ford not to divert and to restore any diverted business?

A. At all levels of our company, Rio Grande officials, but specifically at my case at my office, made continuing solicitations and promise to maintain service and sought not to have us issue a diversion instruction such as we finally did.

Q. After you did decide to divert and these diversions took place, did the Rio Grande make any efforts to cause you to change your mind or get business in the future?

A. I can only answer this realizing that it is four years past. Much verbal discussion occurs at a time like this between the carrier and ourselves, I repeat, at all levels of our organization. It would be impossible for me to specifically analyze that they did or did not continually solicit. The answer I would speak for myself, is, yes, they did continually solicit. They offered assurances that man-

agement would operate the trains to a limited extent. They offered assurances they would persist in their litigation to offset this. These were related to me by persons such as Mr. Bradford, Mr. Key of Rio Grande, and so forth. [fol. 109] Q. During your service at Ford Motor Company in your position, have strikes occurred with other carriers?

A. For the sake of the record, I have been with the company fifteen years and my present position six and there have. I speak with that much background and there have been numerous strikes.

Mr. Highsaw: I move this is irrelevant.

Mr. Cummings: I was going to try to establish the company ordinarily requires preliminary injunctions before they give business to carriers. This was preliminary to doing that, to show the company had developed a policy.

The Court: The objection is overruled, or, the motion to strike is denied.

By Mr. Cummings:

Q. Now, with respect to the strikes on other carriers and indeed with respect to the strike on this carrier, was it Ford's policy ordinarily to wish a preliminary injunction to be issued against a strike before Ford would restore business that had been diverted?

A. Repeating my definition of policy, it was not a policy, it was a practice, however, by local circumstances of each strike, and they are all different, to advise the management of the particular railroad that the best assurance we would like to see is indeed an injunction or restraining order. However, under certain circumstances, when a railroad management, and I speak in terms of vice-presidency or higher, assures us that management personnel can cope with our movements for a reasonable period of time, we would weigh such assurances as against the more firm assurance of a restraining order and make a decision at that time.

Q. Were such assurances given to Ford by the Rio Grande before a preliminary injunction issued in this case?

A. Throughout the several days before and after the diversions, yes, such assurances were made in several forms. We nevertheless considered it prudent to divert the shipments.

Q. What caused you to restore the shipments? These assurances that you spoke of or something else?

A. I believe the term is the extension of a restraining order. In any event, there was some successful degree of litigation from the railroad's standpoint, and that service would continue as a result. We weighed that again another time and felt from the looks of things that we could safely restore shipments via the Rio Grande and we did so.

[fol. 110] Q. In connection with Exhibits 5 and 7 of the plaintiff, both contain a column entitled "Charges" or "Freight Charges". Were those the charges that were paid by the Ford Motor Company in the instances shown on those exhibits?

Mr. Highsaw: Your Honor, I don't have any objection to the substance of the question. I think it ought to be clarified and made clear what is referred to is the total freight charges, not just the Denver-Rio Grande part.

Mr. Cummings: We are willing to accept that modification.

The Court: All right.

A. The freight charges shown in Exhibits handed me numbered 5 and 7 of the plaintiff are the charges drawn off or extracted from the freight bills. They represent, for example, the total cost to Ford or charge made by the railroads for the movement from Wixom, Michigan, for example, to Milpitas, California, the total compensation for the entire journey.

Q. Just to clarify your testimony, the 212 diverted cars you mentioned as having been diverted during this strike and the period thereafter do not include any cars that

might have been diverted from Milpitas on an eastbound movement, isn't that true?

A. They do not include such cars.

Q. They were all westbound, right?

A. Yes, sir.

Cross examination.

By Mr. Highsaw:

Q. Mr. Crawford, before the decisions were made to which you have testified concerning the rerouting of traffic, did you personally make any efforts to contact the Brotherhood of Railroad Trainmen or any representative thereof to find out what their intentions were, stated intentions were, with respect to the matter?

A. No, sir, I did not, and we would not normally do so.

Q. Did insofar as you know anyone in your department or Ford Motor Company make any such effort?

A. Of course, sir, that would be hearsay, but I cannot speak for all the people in the company who might have. Anything I would say on that is conjectural.

Q. In other words, you don't know?

A. That's right.

Q. Within your personal knowledge, was any request made to the Ford Motor Company by the Denver and Rio Grande to increase shipments of parts to Milpitas, California after the reroutings were resumed to make up for any diversions that had previously occurred?

[fol. 111] A. There were no such solicitations presented to me personally. I do not know of any having been made to any of the important persons in Detroit who might command such a decision.

Q. Would your answer be the same if I asked you with respect to these other diversions, namely shipments from the Wixom plant and shipments from the Milpitas plant east?

A. I have to repeat that six or eight individual traffic managers of the company are involved here and I can't speak as to whether or not such solicitations were made.

Q. None were made to you?

A. That's correct.

Q. And you know of no other?

A. I know of no other.

Q. Do you know on what date the Ford Motor Company ordered the restitutions of the reroutings that you testified about?

A. Our wire is dated June 1, 1960.

Q. And what did that do?

A. It closes with the expression, "Please resume normal routing via D&RGW."

Q. Did that contain the statement that the union and railroad officials have agreed to a court decision of their dispute?

A. I believe this an exhibit, but, in any event, reading, "Mr. Bradford, Vice-President of the Rio Grande, advises restraining order prohibiting employees to strike still in effect. Union and railroad officials have agreed to a court decision of their dispute."

Mr. Cummings: That's from Plaintiff's Exhibit 6, Your Honor. That was received.

By Mr. Highsaw:

Q. Do you know what date, Mr. Crawford, that the information that the union and railroad officials had agreed to a court decision of their dispute was received by the Ford Motor Company in Dearborn?

A. There is no record of such information, so I presume it was a telephone call from Mr. Bradford and I would imagine a day or two before the date of June 1. Recalling that this was over a weekend and a holiday of May 30th, it is difficult for me to say just what day it most logically might have been received.

Q. Mr. Crawford, I would like to read to you from pages 24 and 25 of your deposition, which was taken on March 6, 1964, about your testimony on this point. I will show it to you after I have read it to you and ask you if that is your testimony. Question: "Mr. Crawford, do you know the date on which Mr. Bradford of the Denver Rio Grande gave the Ford Motor Company advice that was referred to in Exhibit 3?" Exhibit 3 is the same as Exhibit 6, I think. Answer: "I do not have positive evidence of the [fol. 112] exact date. As I recall, it was the 27th of May." Would that still be your testimony about that, after I have read that to you?

A. Yes, sir.

Q. At any time prior to May 27, 1960, Mr. Crawford, did anyone from the Denver and Rio Grande advise you that the Brotherhood of Railroad Trainmen was willing to stipulate the maintenance of the status quo until the Court had had a full opportunity to pass on the legal issues presented by the injunction request?

A. There is no written evidence of such matter being discussed. I can only presume under circumstances at that time, four years ago, yes, it would have been discussed. No, I have no exact precise memory of the date.

Q. In other words, you don't recall that any such advice was given to you prior to May 27th?

A. I believe I said it probably was. I don't recall a specific transmittal.

Q. Yes, and do you know whether or not—do you have any further information than what you have just said as to whether any such advice was given to anyone else in the Ford Motor Company?

A. I have canvassed the individuals involved. One is deceased and one is in Europe, so it is difficult to ask them all. They would have the same general answer that I would have, probably it was, they don't know the specific date.

Mr. Highsaw: That's all, Your Honor.

The Court: I would like for you to go back and read the question. I want to hear the basic question to which these last answers relate.

The Reporter: "At any time prior to May 27, 1960, Mr. Crawford, did anyone from the Denver and Rio Grande advise you that the Brotherhood of Railroad Trainmen was willing to stipulate the maintenance of the status quo until the Court had had a full opportunity to pass on the legal issues presented by the injunction request?"

The Court: Do you have any further questions of the witness?

Mr. Cummings: Yes, a few questions.

Redirect examination.

By Mr. Cummings:

Q. You may have answered this when Mr. Highsaw was questioning you, Mr. Crawford. Did anybody from the [fol. 113] Brotherhood of Railroad Trainmen ever give you any advice of any offer to maintain the status quo?

A. I did answer on the point. I believe I said no one to me personally, that I couldn't speak for the relatively large number of traffic managers elsewhere in the country.

Q. With respect to Plaintiff's Exhibit 6, which is that June 1, 1960 telegram of Mr. Ward's, and Plaintiff's Exhibit 7, which is the Wixom diversion, I notice that goes through June 4, 1960. Did it take sometime for the restoration of business to the Ford Motor Company after the issuance of the June 1 telegram?

A. I would have to answer that in rather careful terms due to the phenomenon of transit time and when the car would arrive on the Rio Grande, say, at Denver. Using this exhibit, specifically, on the fifth page we show the cross-over, as I label this, on a shipment dated June 1 billed June 3. Now, that occurred practically instantaneously with the June 1 wire, because this shipment was made by a traffic manager at Wixom, which is in Detroit.

so we show that we swung back to the Rio Grande the same day of the wire. I know just from my general knowledge of this type of thing, however, that a similar instruction to that one there would in turn have to be relayed to outside suppliers, such as Budd Company in Philadelphia, and that transmittal might take one or two days, and if Budd was shipping nothing to Milpitas for another day there could be as much as two or three days of restoration of a routing. Similarly, there is that same delay as diverted shipments. That might show up in several more days before arriving at Denver or Pueblo in interchange with the Rio Grande.

Q. With respect to these companies shown on Plaintiff's Exhibit 5, did the Ford Motor Company instruct those companies or cause them to divert the business from the Rio Grande?

A. I don't believe I understand your question.

Q. Well, there are several companies listed, Budd and Warner Gear and so forth. Were those Ford shipments that Ford controlled?

A. Oh, indeed, these are basic shipments subject to Mr. Ward's first wire that said "divert" and the instructions would have gone from Ward to this gentleman by the name of Morcom and he in turn would hand these on to the Budd Company, in the example you used, or any other supplier of the company.

Mr. Highsaw: I object to that last answer and move it be stricken on the grounds it is hearsay.

[fol. 114] The Court: The objection is sustained and it will be absolutely stricken.

By Mr. Cummings:

Q. In the course of your work for Ford Motor Company, does your committee and do you personally give orders to shippers like Budd that are doing business with Ford as to how to ship their parts?

A. I have to explain that in the normal Ford organization chain of command direction from my office normally would go through a division office and then a plant office and then finally to the outside supplier. In a case of supreme emergency we can issue orders directly. That is extremely rare. In the normal course of events, such as this one here, a diversion order is issued by us to another Ford Motor Company employee and then perhaps another to arrive as an order to the outside parts supplier.

Q. And the outside supplier accepts the instructions given, what you call the Ford order?

A. We verify this, as I said, with the deviation form, as well as with the actual surveillance of freight bills.

Q. So your answer would be yes?

A. Yes.

Mr. Cummings: That's all.

Mr. Highsaw: Your Honor, there are just a couple of matters I would like to clear up.

Recross examination.

By Mr. Highsaw:

Q. Looking at Exhibit 5, on the back page, these various plants are listed. Have you got that? Budd, Philadelphia. Is that owned by Ford or is that an outside plant?

A. I noticed in some earlier conversation you referred to it as Ford. It is an entirely independent company.

Q. I did think it was Ford.

A. Well, we are the important customer, but we don't have anything to do with them.

Q. What about Chicago Heights?

A. That is a Ford Motor Company stamping plant.

Q. And Eaton?

A. That's independent.

Q. Monroe?

A. Monroe is a Ford Motor Company stamping plant.

Q. And Warner Gear?

A. That is a completely independent supplier.

[fol. 115] Q. Sterling?

A. Sterling is a Ford Motor Company chassis plant.

Q. And Rouge?

A. Is a complex of essentially ten major Ford Motor Company plants.

Q. All of the shippers there are the Ford Motor Company?

A. Yes.

Q. One more question. At the time this decision you have referred to with respect to rerouting was taken, were you aware that the strike had been called off by the Brotherhood? You have heard Mr. Carroll's testimony this morning as to calling off of the strike. Were you aware of that fact at the time you took this decision?

Mr. Cummings: I don't think he testified he called off the strike. The restraining order was issued at seven o'clock and that stopped the strike.

Mr. Highsaw: I think he testified he called the people concerned and called off the strike. Regardless of what he testified, I will rephrase the question. Were you aware the strike had been called off at the time of this decision?

A. Subject to the delays of communication, we were aware first there was a work stoppage for several hours and following that time that the work stoppage ceased. We still felt it prudent to sustain our diversion.

Q. Now, with reference to these time matters, referring back to Plaintiff's Exhibit 4, Mr. Crawford, am I correct that you testified that this Mailgram was sent out on May 18th and the reroutings are effective May 19th?

A. My copy of the diversion wire given to me personally is marked effective May 19th.

Q. Exhibit 5 actually shows shipments occurring on May 19th, does it not? I am referring to page 4, I believe I am looking at, Your Honor.

A. I can't lay hand on that copy at the moment.

Q. I will show you mine so you can verify the correctness of it.

A. Yes, sir, there are certain dates marked there, the earliest of which is 5-19.

Q. Now, this is also true, is it not, of the document that has been identified and received as Plaintiff's Exhibit 7 there, where there are shipments there that are marked May 19th?

A. Yes, sir, there are.

[fol. 116] H. F. BURNAUGH called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you give your name and address?

A. H. F. Burnaugh.

Q. And what is your position if any with the Rio Grande?

A. Address is Denver, Assistant Vice-President of Traffic.

Q. Did you occupy that position during May and June of 1960?

A. May and June, 1960, I was Assistant to the Vice-President of Traffic.

Q. Are you familiar with the situation that arose during the time of the strike and immediately thereafter?

A. Yes.

Q. Did any shippers, to your knowledge, divert any business from the Denver and Rio Grande during that period, May and June of 1960?

A. Yes, sir.

Q. What companies did divert, if you know?

Mr. Highsaw: Your Honor, I object to this without first laying a foundation as to the basis of his knowledge.

The Court: The objection will be sustained.

By Mr. Cummings:

Q. Very well, what is the basis of your knowledge, Mr. Burnaugh? How did you learn it was diverted? As part of your duties in the traffic department?

A. At this time it was my duty to keep our various offices throughout the country advised as to the situation on our railroad with respect to the strike that was called, with respect to the restraining order that was issued, and ask those offices to make every effort to avoid the loss of traffic to us because of the situation.

Q. Well, in the course of that work for your company, did you learn of any companies that diverted business from the Rio Grande because of this strike?

A. I was very definitely told by the Ford Motor Company that they were going to remove us from the routing of their traffic and endeavored to get them to not do it, but their policy was that it would be taken away.

Mr. Highsaw: I move that that statement be stricken, Your Honor, on the grounds that it is hearsay.

[fol. 117] Mr. Cummings: It was something he was told personally.

The Court: The motion is denied. This ties in with Crawford's testimony.

By Mr. Cummings:

Q. Again, as part of your duties at that time in the traffic department, I will ask you what other shippers if any diverted from the Rio Grande during the course of this strike?

Mr. Highsaw: May I have the question read back? I didn't quite catch it.

(The reporter read the pending question.)

Mr. Highsaw: Your Honor, I object to that question without a foundation being laid as to the source of whatever information he is going to testify about and how he got it.

The Court: Objection sustained.

By Mr. Cummings:

Q. Very well, Mr. Burnaugh, would you relate to the Court what information you obtained and how you obtained it?

Mr. Highsaw: That will also include from the specific people?

Q. (Continued) And also how you learned it, namely from what persons.

A. We asked all of our offices, traffic offices, to advise us of shippers who diverted traffic from us during this period and the number of cars that were diverted and that information is included on this exhibit.

Q. And did that information come to you as a part of your duties at the Denver and Rio Grande?

A. It did.

Mr. Cummings: I think there is a sufficient foundation, Your Honor.

Mr. Highsaw: Your Honor, I move—well, he hasn't testified yet as to any diversion, but I would object to any questions as to any diversion from any other companies other than Ford which we have now covered on the grounds that it is very clear that what he is saying is information [fol. 118] which has come to him from traffic people out in the field of the Denver-Rio Grande, and without any indication of the source of their information. They might have picked it up in a discussion in a barroom someplace as far as the record shows. I think it is very clearly hearsay and incompetent evidence.

Mr. Cummings: (To witness) We only want you to testify as to what you learned, as you say, from your own traffic officers during the period.

The Court: I think the objection must be sustained. You are predicating your basis for your damages here on this testimony and it is not direct enough. It is hearsay. It isn't the same situation you had with reference to Ford, and I sustain the objection.

By Mr. Cummings:

Q. In the course of your business in the traffic department, have you personally been advised of any companies that diverted—let me finish the question, please—that diverted business from the Rio Grande during this strike?

Mr. Highsaw: Objection on the same grounds, Your Honor. It is the same question.

The Court: Objection sustained.

By Mr. Cummings:

Q. During this period, did you or your department give any instructions to your freight agents with respect to endeavoring to hold business during this strike and the period thereafter?

A. Yes, we advised all of our offices that this strike had been called, also that a temporary restraining order had been secured and asked them to urge all of our shippers to not divert traffic from us.

Q. Now, did any of these men in your employ send you reports as to any shippers that nevertheless insisted on diverting freight from the Rio Grande? Did any reports come to you as part of your duties with the Rio Grande? A. Yes.

Q. And what did these reports show?

Mr. Highsaw: Objection, Your Honor.

Mr. Cummings: These are reports from his own men. [fol. 119] Mr. Highsaw: It is the same difficulty, Your Honor.

The Court: The objection is sustained. Mr. Cummings, I think we are going to save some time here—if you intend

to elicit from this witness evidence that he obtained from agents of the Rio Grande over the country and it will not be supported by the shipper themselves or documentary evidence from the shippers showing that there were diversions made, the Court will not allow such testimony over objection of the defendant, and it is obvious that the defendant is objecting to it, so I suggest that if this is what you propose to do by this witness and knowing the Court's feeling in the matter that you make an offer of proof for the record and that way the record will reflect what you intend to establish here.

We will take a brief recess.

(The Court recessed from 10:35 o'clock a.m. until 10:48 o'clock a.m.)

Mr. Cummings: If the Court please, my offer of proof through this witness would be that Kennecott Copper Company diverted 10 cars of copper bullion from Garfield, Utah to Baltimore, Maryland, Denver and Rio Grande revenue, $4,089.87. Chicago Bridge and Iron diverted eight cars of steel from Chicago to Salt Lake City, Utah, Denver and Rio Grande revenue, $4,532.51. Commercial Shearing and Stamping Company, six cars of steel from Chicago to Salt Lake City, $3,399.38. Welch Planing Mill diverted three cars of lumber from Midvale, Utah to Marshfield, Wisconsin, Denver and Rio Grande revenue $779.52, and the Ruberoid Company diverted two cars of roofing, Denver to Salt Lake, Denver and Rio Grande revenue, $1,021.76, and the witness received this information from his own company's freight agents.

The Court: Will you have any documentary evidence that would support this other than a summary?

Mr. Cummings: Not present in court, Your Honor.

The Court: All right.

By Mr. Cummings:

Q. Mr. Burnaugh, during the course of the strike, did you cause certain telegrams to be sent under the name of

Mr. Bradford to various people throughout your organization?

A. I did.

[fol. 120] Q. And what did those telegrams advise the people throughout—

Mr. Highsaw: I object, Your Honor. The best evidence is the telegram.

Mr. Cummings: Well, if you want them put in, they are all attached to the answers to the interrogatories.

Mr. Highsaw: Let me take a look at them and see.

The Court: All right.

Mr. Highsaw: Are you referring to the—

Mr. Cummings: Ones attached to the answers.

Mr. Highsaw: Just show me which ones you have in mind.

(Counsel examined documents.)

Mr. Highsaw: Your Honor, I don't wish to be unduly difficult, but it seems to me that we get into a problem. We have got a number of documents here and having somebody give a general description of what all these documents say—

Mr. Cummings: We would be glad to offer them.

Mr. Highsaw: I think the best thing is put them in evidence, I am not going to object to them, and let them speak for themselves.

The Court: All right.

Mr. Cummings: We will have them marked as collective Exhibit 10, if we may.

(Plaintiff's Exhibit 10 was marked for identification.)

Mr. Cummings: May collective Exhibit 10 be received in evidence, Your Honor?

The Court: Yes.

[fol. 121] (Plaintiff's Exhibit 10 for identification was received in evidence.)

The Court: It was my understanding that there was no objection.

Mr. Highsaw: No, I have no objection. Just for clarification, Your Honor, some of these telegrams it is obvious to whom they were sent, but in others it is not quite clear and I would like to have it identified on the record as to who these people are.

Mr. Cummings: We will do that through the witness or you can do it in cross-examination.

Mr. Highsaw: Well, either way is all right.

By Mr. Cummings:

Q. Showing you Plaintiff's Collective Exhibit 10, are the persons listed on the first page as recipients of the telegrams traffic agents with the Rio Grande?

A. These are all Vice-Presidents of Traffic of our connecting lines. The balance are our own people.

Q. So only the first eight are connecting lines and the rest are your people, is that right?

A. Right.

Q. And the third page is directed to all traffic agencies. Does that refer to your traffic agencies?

A. That's our traffic agencies.

Q. And then the next telegram, June 2, 1960, the same holds true as the first telegram of July 11, 1960, as to the recipients?

A. Right.

Q. Who was Mr. Lucas?

A. General agent at San Jose, California.

Q. That's listed in May 27, 1960, and Mr. Conrad in the May 25, 1960 communication, who is he if you know?

A. Vice-President, Rock Island, at that time, Chicago.

Q. And this wire of May 26, 1960, the same recipients as the first wire?

A. Right.

Q. To whom did the wire of May 20th go?

A. That was a wire from the traffic manager, Missouri Pacific, St. Louis, to our traffic manager, Borden, Denver.

Mr. Highsaw: Just one moment, which documents are we talking about now?

[fol. 122] Mr. Cummings: We have been going through them consecutively.

Mr. Highsaw: I understood when we started out you were confining this to documents which the witness has sent under the name of R. K. Bradford, but you are now talking about a telegram that was sent by a man on another railroad.

Mr. Cummings: I understood you to say you would like to have all these in to save time.

Mr. Highsaw: No.

Mr. Cummings: We will confine the ones that we have been offering and were received to those signed by Mr. Burnaugh or by Mr. Bradford.

The Court: All right.

A. (Continued) First one is this one of May 16th.

Q. We don't have to go through them again. And, on May 19, 1960, there is a memo signed R.K.B. Is that one of Mr. Bradford's?

A. That's Mr. Bradford.

Q. And that's true on May 19, 1960?

A. That's right, that's our man in Chicago.

Q. May 18, 1960, is yours?

A. Right.

Q. To Mr. Bradford?

A. That's right, mine.

Q. May 18, 1960 is signed by you and addressed to whom?

A. J. D. Key, general agent, Detroit.

Q. May 19, 1960, is from you to Mr. Bradford, right?

A. Right.

Q. And May 18, 1960, the same, and the final one is the same recipients as the top one, isn't that true?

A. Right.

Q. During the course of this strike, did you communicate at all to any shippers over the telephone or otherwise?

A. Yes, I did. I talked to Mr. McCown, traffic manager at Ford Motor at Milpitas, several times.

Q. What was your conversation?

A. Endeavoring to get Mr. McCown to not divert their traffic from us.

Q. Were there any other shippers that you personally solicited to keep the Rio Grande business?

A. Other than that, I do not recall any.

Q. Did you or did you not keep Mr. McCown advised of the status of the strike?

A. I did.

[fol. 123] Q. And that goes to the period immediately following the strike in May and June of 1960, too?

A. Yes.

Q. Now, from information given to you personally, do you know from your records whether or not the Ford Motor Company at Milpitas attempted to restore any business to you that was lost during the strike?

A. No.

Q. Your records show no such restoration of business, is that your testimony?

A. None that we could identify.

Q. And did your associates, if you know, in the traffic department, at the same time you were endeavoring to obtain back the Ford business from Milpitas attempt to obtain business back from other shippers?

A. Yes.

Q. And their conversations with other shippers, to your knowledge, would have been similar to yours with Mr. McCown?

A. I would presume so.

Mr. Highsaw: Your Honor, I am going to have to move to strike this last answer because the only testimony we have in the record so far with respect to shippers is the Ford Motor Company.

The Court: The last answer will be stricken.

By Mr. Cummings:

Q. Do you personally know whether or not anyone in the Rio Grande solicited any other shippers during the course of this strike and the period following?

A. Well, it is a duty of our traffic representative—.

The Court: Well, you could answer that yes or no, Mr. Burnaugh.

A. (Continued) Yes.

Q. And what is that knowledge?

A. That all of our representatives were endeavoring to retain traffic for the railroad and to get back traffic that had been taken from us.

Q. For the record, would you identify the Mr. Dan McCown you mentioned at Milpitas?

A. Dan McCown is traffic manager, Ford Motor Company, Milpitas plant.

Q. Did he occupy that position in May and June of 1960?

A. He did.

Q. He still occupies it, you say?

A. Yes.

Mr. Cummings: That's all.

[fol. 124] Cross examination.

By Mr. Highsaw:

Q. Mr. Burnaugh, did you give any instructions to any of the traffic solicitors or agents of the Denver Rio Grande under you during the period May 16th to June 1, 1960 to request the Ford Motor Company to increase the volume of their normal shipments over the Denver and Rio Grande when they again routed traffic over your carrier in order to equalize any diversions that had taken place?

Mr. Cummings: I object to this line of questioning, Your Honor, on the ground that I gave in my opening statement, namely that this is a tort case so it is immaterial whether

third parties ever made the plaintiff whole, and I have several citations, including one from the Tenth Circuit, which I would be glad to cite to the Court because it will be a continuing matter. Perhaps it should be disposed of now.

The Court: All right, I will hear it.

Mr. Cummings: The case in this Circuit to which I have reference is Grayson versus Williams, found in 256 Federal Second 61, a tort case, and the one point in question was whether plaintiff was entitled to recover even though his expenses had been paid by a third party, and in allowing full damages the Court stated as follows:

"Where a part of a wrongdoer's liability is discharged by payment from a collateral source," such as Mr. Highsaw is endeavoring to show here, "the question arises, who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damage caused by his wrongful act. If there must be a windfall, certainly it is more just that the injured person shall profit therefrom rather than the wrongdoer shall be relieved of full responsibility for his wrongdoing."

"We think this conclusion is supported by the great weight of authority," citing Hudson versus Lazarus from the Court of Appeals in the District of Columbia, and saying that it, "held that an injured person may usually recover in full from a wrongdoer regardless of anything he may have received from a collateral source, and it is stated that the best interests of society as well as the purposes of the parties are likely to be better served if the injured person benefits rather than the wrongdoer benefiting." If you would like to hear similar rules from other circuits, I will be glad to give them.

[fol. 125] The Court: No, I will hear if Mr. Highsaw has any response.

Mr. Highsaw: Yes, I don't think that what Mr. Cummings is arguing here has any application to what we are

trying to show. This is not a matter of being reimbursed from an injury from a collateral source.

What we are trying to determine here is what the extent of the injury actually was and in this case the injury that is claimed is the diversion of shipments and the loss of revenue from shippers not shipping over the Denver and Rio Grande, and if in one week the shippers don't ship ten cars and then in the next week they ship twenty cars it is our position that the railroad has no loss. It is not a matter of being reimbursed from a collateral source.

The Court: The objection will be overruled. I am going to receive the evidence, and in so doing I am not going contra to the decision which you read from, Mr. Cummings, or at least I am not intending to.

I am receiving it in line with the statement of Mr. Highsaw that they are offering the testimony as evidence of the actual loss of business that was sustained by the railroad.

Mr. Cummings: Well, Your Honor, the business was lost, and under these cases it is immaterial that perhaps later on they got other business.

Reading from Restatement of Torts: "It is a well-settled principle of law that a tort feasor cannot escape the consequences of his wrongdoing merely because his victim was fortunate enough to receive reparation from a collateral source."

Mr. Highsaw: Our position, of course, would be the carrier can't pick an arbitrary date and say, "Cut it off, that's the date at which we have lost." You have to look at the whole picture.

The Court: Yes.

Mr. Highsaw: I will rephrase my question.

By Mr. Highsaw:

Q. Mr. Burnaugh, my question is, Mr. Burnaugh, whether between May 16, 1960 and June 1, 1960 you gave any instructions either written or oral to any Denver and Rio

[fol. 126] Grande representatives or anyone under you to request the Ford Motor Company to increase their shipments to you when their reroutings commenced in order to equalize any amount of any diversions which had taken place during the period May 16th to June 1st?

A. I did not, for the reason that—

The Court: You don't need to go on. You have answered the question. If they want the reason, they will ask you.

Mr. Highsaw: That's all I have.

Redirect examination.

By Mr. Cummings:

Q. Mr. Burnaugh, I will ask you the reason that you were just about to testify to?

A. Knowing the policy of the Ford Motor Company in establishing the routing of their setup automobiles and parts in which they allocate to us a certain percentage of their business, it is very difficult for them to change that status to make up business that was completely taken from us during this period.

George F. Fitz-William, called as a witness for the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Would you please state your name and address?

A. George F. Fitz-William, 1531 Stout Street, Denver, Colorado.

Q. What is your position with the carrier?

A. General Freight Agent.

Q. Stationed here in Denver?

A. Yes, sir.

Q. Showing you Plaintiff's Exhibit 3 for identification, I will ask you whether you prepared or caused to be prepared the information shown as the Denver and Rio Grande Revenue loss on shipments that were diverted during the strike?

A. I did.

Q. And you are responsible for the work shown on this exhibit up to the line on the second page that goes across the page?

A. Line across the page.

Q. Do you have a copy of that?

A. Yes, sir.

Q. Now, as a result of your work in obtaining the figures on the Denver and Rio Grande Revenue that was lost, how much did you determine was lost during the course of this strike?

[fol. 127] Mr. Highsaw: Your Honor, I am going to object to that question and unless it is limited and I think we might as well now bring it out and object to the exhibit unless it is limited. I have several objections, so I think it would be better to take them up one at a time.

This exhibit, down to line 7, deals with the Ford Motor Company, or down to line 9, deals with the Ford Motor Company, so at this point—I will come back to that in a moment, but beginning with line 10, 11, 12, 13 and 14, the exhibit deals with alleged estimated loss of revenue sustained by the Denver and Rio Grande from shippers, of which there is no evidence in the record, and I would move that those lines, first, be stricken from the exhibit and that no testimony be permitted with respect to those lines.

These are the companies that Mr. Burnaugh was attempting to testify about.

Mr. Cummings: Well, with that suggestion would you have any objection to the admission of this exhibit?

Mr. Highsaw: Well, then line 15 becomes completely meaningless because the figures—

Mr. Cummings: It would have to be corrected, yes.

Mr. Highsaw: The line of figures in line 15 are wrong. That's my first objection, and my second objection, Your Honor, is that from lines 1 to 8, which deal with the Ford Motor Company—and I know this has already been ruled on, but in order to keep the record straight I would want to object to that as a part of my continuing objection dealing with the Ford Motor Company.

Mr. Cummings: 1 through 9?

Mr. Highsaw: 1 through 9, and, finally, Your Honor, on page two of this exhibit, it contains data relating to the Denver and Rio Grande Western expenditures for the year of 1960.

Mr. Cummings: I don't intend to ask this witness about it. We have another witness.

[fol. 128] Mr. Highsaw: You won't offer that at this time?

Mr. Cummings: I will be glad to—

Mr. Highsaw: Then I won't make that objection. I will confine myself to the objections I made.

Mr. Cummings: Are you objecting to the receipt of this exhibit if we delete lines 10 through 14 and change the addition?

Mr. Highsaw: I would have to object to the whole exhibit on the basis of my continuing objection so that the record is straight. As far as the rest of the lines, 10 through 15, I would object to it, as I said, on the ground that there is no evidence in the record supporting it, and although Mr. Cummings said he is not going to elicit testimony from this witness he is about to offer this exhibit which contains this material down at the bottom about which I have a very basic objection, which is a third and entirely separate objection.

Mr. Cummings: We are willing to confine our offer to everything above the black line there on that page and with the deletions you suggest.

Mr. Highsaw: All right, I won't go any further then.

The Court: Well, for the Court to be consistent at this point, it would seem that if the exhibit—and I have not

seen it, so I don't know what is on the first nine lines, but I assume from the colloquy or statements of counsel this relates to the Ford Motor Company shipments about which we have had some testimony. Now, I would receive all of the evidence relating to Ford Motor Company shipments that Mr. Crawford testified to, the 212 approximately cars. I don't recall the number. Yes, it is 212 cars.

Mr. Cummings: That's excluding those from California.

The Court: Yes, that's right. I will receive that in evidence, and this would be consistent with my previous ruling, of course, and the other, if there is evidence in those first nine lines about the 64 cars shipped eastward from the California plant, Milpitas, I would have to sustain that at this time.

[fol. 129] Mr. Highsaw: Yes, they are on line 2.

The Court: Yes. Well, I would sustain the objection to that part of the exhibit at this time.

Mr. Cummings: Your Honor, if we could just interrupt the witness for a moment, I think we can straighten that out. We were planning and so was Mr. Highsaw planning to offer the deposition of Mr. McCown, marked Exhibit 9.

Mr. Highsaw: I have no objection to the offer of Mr. McCown's deposition, and on that basis I have no objection to the inclusion of line 2 in Exhibit 3.

The Court: All right then, the first nine lines of the exhibit will be received.

(Plaintiff's Exhibit 3, the first nine lines, were received in evidence.)

The Court: Do you want to mark this, Mr. Clerk?

Mr. Cummings: Yes, that's Plaintiff's Exhibit 9.

The Court: Oh, you already have marked it?

The Clerk: We marked their copy.

Mr. Cummings: Will you mark the Court's copy, please, and we will withdraw this?

(Plaintiff's Exhibit 9 was marked for identification.)

By Mr. Cummings:

Q. Mr. Fitz-William, can you make a rapid calculation and take out the last few lines and just total up from the first nine lines as to the Denver and Rio Grande Revenue that was lost?

A. I did during the recess as far as the righthand column is concerned, and that would total $89,743.38.

Q. Eighty-nine thousand, what was it?

A. Seven hundred forty-three dollars and thirty-eight cents.

Q. So that should be substituted for the $103,566.42 on the second page of this exhibit?

A. Yes. Yes, sir, I didn't calculate the difference in weight or the freight charges. The number of cars would be 274 then.

[fol. 130] Mr. Cummings: For the Court's information, at page 55 of Mr. McCown's deposition, which now has been received as Plaintiff's Exhibit 9, he did testify that 62 cars had been diverted and that's why that figure has been used in this exhibit.

The Court: Page 55?

Mr. Cummings: I thought it was 55, I may have the wrong page.

Mr. Highsaw: While we are on that subject, Your Honor, I would like to call Your Honor's attention, so you have it in mind now, that on pages 42, 46, 51 and 52 of that deposition, Mr. McCown said that he equalized these shipments and gave the Denver and Rio Grande immediately after May 26, 1960, 62 cars, which he would have otherwise shipped over the Union Pacific.

Mr. Cummings: Page 51, Your Honor. I was wrong. It was 62 cars diverted.

The Court: All right, and I have noted the pages that Mr. Highsaw gave.

Mr. Highsaw: 42.

The Court: 46, 51 and 52, those were the numbers I got.

Mr. Highsaw: That's right.

By Mr. Cummings:

Q. Now, Mr. Fitz-William, in preparing this exhibit, how did you arrive at the Denver and Rio Grande division?

A. By applying the established published divisions to the freight revenue.

The Court: I didn't quite understand.

The Witness: By applying the established published divisions to the freight revenue. We have division sheets.

The Court: Yes, I understand it now.

By Mr. Cummings:

Q. So, through those sheets, you arrived at the Denver and Rio Grande division of freight charges shown in the next to last column?

A. Yes, sir.

[fol. 131] Q. For the purpose of the record, you might explain what a division would be for the D&RG.

A. On line 1, for example, covering the automobiles on trailer, on flat cars, from Detroit to Salt Lake City, Wabash to Kansas City, CNRP to Denver, thence the D&RGW, the published divisions are in WTL Division Sheet 500-A broken over East Hannibal, and over west of East Hannibal the division is broken over Kansas City and the division published in WTL Division Sheet 700, and then west of Kansas City is divided over Denver on the divisions published in D&RGW Division Sheet 7213-A, and these issues provide that the D&RGW will receive 62 and a half percent of 85 percent of 76 percent of the freight charges, and that amounts to $49,338.72 when applied to freight charges of $122,200.

Mr. Cummings: Thank you, Mr. Fitz-William, that's all.

The Court: Well, just a moment, Mr. Cummings. I note on Exhibit 3 there is a percentage arrived at.

Mr. Cummings: Underneath the long line, Your Honor?

The Court: Yes.

Mr. Cummings: Yes, we didn't offer the exhibit for that purpose because of Mr. Highsaw's objection. We are taking that up with another witness.

The Court: Oh, all right, that is satisfactory.

Mr. Highsaw: When we get to that, I have another objection.

Cross examination.

By Mr. Highsaw:

Q. Mr. Fitz-William, I take it your testimony you just gave as to the manner in which you work this out with one shipment applies to all of them?

A. Yes, sir.

Q. These established divisions, were they the divisions that were in effect in May of 1960 or the ones in effect today?

A. No, May, 1960.

Q. Have there been changes in those divisions since then?

A. I don't believe there have been in any of the divisions that was used on this traffic.

[fol. 132] Q. If I went down to the Interstate Commerce Commission and looked in your tariffs, I could find these, could I?

A. I am not sure these are all on file with the Interstate Commerce Commission. We are not required to file them with the Interstate Commerce Commission. They would be on file in our office.

Q. If they are not on file in the Interstate Commerce Commission, what is the nature? Is this an agreement?

A. I believe with one exception, WTL Sheet 700, and that is a Commission basis and is filed. The rest of them are made by the carriers.

Mr. Highsaw: That's all.

The Court: All right, you may step down, Mr. Fitz-William.

Mr. Cummings: If the Court please, to be consistent with our offer of proof, we would like an objection noted to the deletion of lines 10 through 14 of this Exhibit 3.

The Court: Yes. Well, the whole exhibit will be in the record so if the Court made an error, why, it will just be a mathematical computation.

Mr. Cummings: Mr. Darnell, would you take the stand, please?

A. L. DARNELL called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Cummings:

Q. Mr. Darnell, would you give your name and address and position?

A. A. L. Darnell, 3039 West Denver Place, Denver, Colorado. The title of my position is Cost Analyst, Denver and Rio Grande Western Railroad.

Q. Did you have anything to do with the preparation of what has been received in evidence as Exhibit 3, up from the bottom line down on page 2?

A. I calculated some operating ratios for selected expenses.

Q. Do you have a copy of that exhibit with you?

A. Yes, I do.

Q. If you could explain to the Court, please, how you arrived at the figures shown below the full line on the second page of that exhibit?

[fol. 133] Mr. Highsaw: Your Honor, I think now is the appropriate time to make the objection I have to this line of testimony, which will also necessarily involve the last part of page 2, as this also is a part of Exhibit 3. Well, it would be limited to these figures at the bottom of 2 of Exhibit 3.

Now, the basis for this objection is this, Your Honor. The defendants served interrogatories on the plaintiff railroad back in the beginning of this lawsuit, asking them to detail their claims of damage in this situation.

On January 27th, the carrier filed an answer to those interrogatories.

Now, Question 20 of these interrogatories: "Set forth the approximate amount or total loss if any which plaintiff claims resulted from the strike alleged in the complaint not covered by Questions 8 and 14."

Question 14 related to actual operation of trains on the day of the strike. No damages were claimed. So, this covered other possible items.

21 was to furnish a breakdown.

Question 22 was to set forth how the amount or amounts furnished in response to Questions 20 and 21 were calculated.

In response to those questions, the carrier, on January 27, 1964, filed—

Mr. Cummings: You are referring to the answers of the first of the three sets of interrogatories?

Mr. Highsaw: Yes, first interrogatories filed, an Exhibit A, which included various listings of shipments and revenue, and the part we are concerned with here is at the bottom in response to Question 22, to set forth the amount or amounts furnished in response to the above questions, they gave figures covering these items that are on the last page of Exhibit 3, and the items they gave were for the year 1960. Maintenance of weight, 10.44. That compares with 10.0 in Exhibit 3. Maintenance of equipment, they gave the figure 15.09 as compared with the figure 13.09 in Exhibit 3.

[fol. 134] Under the transportation item, they gave the figure 32.14 as compared to the figure 28.53, which is set forth in Exhibit 3. The total, which was the total direct expenditures of the carrier for the year 1960, was given in this Exhibit A in answer to our interrogatories as 57.67

as compared to the total direct expenditures set forth in Exhibit 3 of 51.62, or, in other words, Exhibit 3 sets forth direct expenditures a little more than 6 percent lower.

The net which was set forth in Exhibit A to the answers to interrogatories which was applied to the claim of revenue loss was 42.33. In Exhibit 3 as a result of using a much lower direct expense figure the carrier has set forth a net of 48.38, which it applies to this figure, which we now have the record of, $89,743.38, which would be on line 15.

Mr. Cummings: The reason for that is we discovered the previous figures given in the first set included passenger trains and the costs thereof.

Mr. Highsaw: Wait just a moment, I haven't completed my objection.

Mr. Cummings: I thought you had.

The Court: Well, are you willing to accept the 42.33 net figure, Mr. Highsaw?

Mr. Highsaw: Well, I am willing to accept the figure as the figure, Your Honor, for the direct transportation costs for the entire year. I have a position that that's not the correct figure to apply to the revenue in order to get an estimate of loss, that you should apply the figure of the direct cost for operating during the month of May, 1960, which is not this figure, but I would accept the 42.33 figure as being their direct transportation cost for that year.

Now, I was coming to the fact that after they had given this 42.33 net, we then in a subsequent set of interrogatories which were answered in June of 1964 asked them with respect to each one of these items, maintenance of way, maintenance of equipment, transportation, what was the source and how it was calculated, and the carrier came back and said the source was their annual report to the stockholders and it was taken out of that and calculated [fol. 135] from that, and we now find they haven't offered it yet in evidence, but they have a document here which indicates that these figures they have in Plaintiff's Exhibit

3 are taken out of a form, an annual report to the Interstate Commerce Commission for the year ending December 31, 1960, various lines that are listed in that, and our objection is that we filed these interrogatories for purposes of discovery, to discover what their case was. This was the information they gave us.

Late day before yesterday, late in the evening, I was handed these figures and all these reports are in Washington, and I have no way of checking these. I did attempt yesterday by telephone to get some information and I managed to get some information about what their costs were during the month of May, but I haven't been able to as yet obtain sufficient information to go into this, and I think they should be held to the cost figure which they gave in answer to the interrogatories.

Mr. Cummings: Your Honor, that figure that we did give in the answer to the first of the three sets failed to recognize the fact that this is strictly a freight case and included the costs of passenger transportation. I discovered that when I got here on Monday when we were preparing Exhibit 3 and asked the witness to come up with a more accurate figure, at least one that seemed to me more accurate, one that represented only freights since this is a freight case.

Secondly, Mr. Highsaw neglected to point out in the first set of interrogatories we were claiming damages of $62,000. Now, we are down to $50,000. I should think he would be happy we are down to $12,000.

Regardless of that, that's the reason for the discrepancy, and as soon as we got the exhibit completed we were sure he got a copy. As he said, he had it since day before yesterday.

I also thought it would be more accurate to use the Interstate Commerce Commission forms and reports than merely the carrier's annual report.

The Court: Well, inasmuch as there is a variance between the percentage figures as shown on the answers to the interrogatories and the tendered exhibit, it seems to me that

the fair solution of the matter would be to require the plaintiff to utilize the lower of the two figures.

[fol. 136] Mr. Cummings: Even though as soon as we discovered it was erroneous we made it plain to the other side? We told them as soon as we discovered it.

The Court: Yes, but you were pretty late in discovering it. There is no provision in the pretrial order where there is a provision an exhibit such as this can be offered this late that I know of.

Mr. Highsaw made this a part of his objection, he didn't have time to check it. It is obvious to me he didn't have time.

Mr. Cummings: Well, the witness is here for him to check it.

The Court: I know he has been in trial as you have.

Mr. Cummings: If the witness is here for him to check it with—

The Court: Yes, but the Interstate Commerce Commission records aren't here. Well, this is my resolution of it. When these controveries come up the Judge has to decide it and I think this is the fair decision. That will be it.

Mr. Cummings: If Your Honor thinks that we should be bound by the answers to the first set of interrogatories, I will turn over to Mr. Highsaw a substitute page for the exhibit which was prepared on that basis, that included passenger costs, even though we don't think it is as accurate as the page he now has, which uses the 42.33 percent figure.

Mr. Highsaw: Let me inquire about one thing Your Honor. I am not clear when Mr. Cummings talks about this exhibit being limited to passenger cars.

Mr. Cummings: It included passenger cars.

Mr. Highsaw: The original one included, and the present one being limited only to freight cars, because when I was handed Plaintiff's Exhibit 3 I was also handed a document here which hasn't been offered which I assumed went along with this and it had all these tariff divisions on it, and then at the bottom on the second page it had the source for

what we are talking about here and he gives total rail-
[fol. 137] way operating revenues of $71,551,375, and then it gives these total direct expenses they have here and they come out with the same 51.62 figure, and it looks to me like it is a figure that includes all of the total railway operating revenue, still isn't limited to freight.

Mr. Cummings: We can ask the witness.

By Mr. Cummings:

Q. The revised page does not include passenger costs?
A. It does not include passenger costs or revenues.

The Court: Or revenues. All right.

Mr. Cummings: If you are willing to accept the 42.33 percent figure, Mr. Highsaw, as the Judge suggested, as a compromise, we will go along.

Mr. Highsaw: I am willing to accept it as being the correct net figure for the year 1960. It is my position that it is *not the correct* figure for this month.

The Court: Well, it is accepted, as I understand, as the annual cost figure. That is the lower figure, but counsel for the defendant reserves the right to insist that the cost figure that should be utilized here is the cost figure for the particular month in question, namely May of 1960.

Does that accurately state your position?

Mr. Highsaw: That states it accurately.

The Court: All right.

Mr. Cummings: To resolve the dilemma then, Your Honor, we will substitute for the second page of Exhibit 3 the page which Mr. Highsaw was shown a few moments ago which does use the lower net as shown in the answer to the first set of answers to the interrogatories.

By Mr. Cummings:

Q. Now, using that page, Mr. Darnell, would you explain how the figures below the line were computed by you?
[fol. 138] A. These figures were taken from the annual

report to the stockholders and the total revenue for the year was divided into the expenses under these various categories to arrive at a ratio of these operating expenses to gross revenues, and these percents so determined of 57.67 percent for operating expenses including maintenance of way and structures, maintenance of equipment and transportation. 42.33 percent, as the balance, would be the net figure after those expenses were excluded.

Q. So that the costs of running these trains are in the three items, maintenance of way and structures, maintenance of equipment and transportation, isn't that so?

A. They are included in it.

Q. And you used the percentage figure 42.33 percent with reference to the $103,000 shown on the righthand column of page 2 in arriving at the figure of $43,839.67?

A. That's correct.

Mr. Cummings: That would have to be reduced, Your Honor, because as the previous witness testified if you delete the last few companies in accordance with your ruling the total should not be $103,000.

The Court: Well, shouldn't the answer then be 42.33 percent of $89,743.38?

The Witness: That's correct.

By Mr. Cummings:

Q. These figures you have used are the total actual cost of moving the freight in question, isn't that true, to the best of your ability?

A. That's the full cost.

Mr. Cummings: Yes. Mr. Highsaw.

Cross examination.

By Mr. Highsaw:

Q. Mr. Darnell, is it not a fact that these are direct costs, these items we are talking about here?

A. They include allocated costs.

Q. They include allocated costs. Isn't it a fact that these items of cost that we are talking about here—well, strike that. I should ask you what allocated costs are included in those figures?

A. Oh, maintenance of way and structures is principally allocated. Depreciation on road property is allocated. Depreciation on equipment is allocated. Direct costs would be crew wages and locomotive fuel and car repairs, things like that.

[fol. 139] Q. Now, isn't it a fact that in speaking of these items of cost that your costs in May are much higher, for example, these items, than in December?

A. I did not compare any figures. This could very well be. If the tonnage decreased and we were still operating the trains with lighter tonnage, then the costs would be greater, yes.

Q. Are you familiar with your 1960 financial figures?

A. No, only just what we took off the stockholders' report for this exhibit. That's all I am familiar with right now. I generally know.

Q. You don't have any figures for the month of May, 1960?

A. No, sir, not with me.

Q. And these figures were not included in your stockholders' report?

A. The May figures?

Q. Yes.

A. Oh, yes.

Q. The figures were given by the month? I mean, the figures for the stockholders included an entire year, is that correct?

A. Yes, it included the entire year. I don't believe there is figures in there month by month. I do not believe that's given to the stockholders.

Q. Do you have your May, 1960 stockholders' report here?

Mr. Barrows: I should have a copy. Evidently in my packing to come to court this morning I omitted it. I will bring you a copy, if you wish.

The Court: All right, would you bring it after lunch.

Mr. Highsaw: Could I ask that this witness be available then, after I have had a chance to look at it?

The Court: Yes.

Mr. Highsaw: Thank you, that's all.

OFFERS IN EVIDENCE

Mr. Cummings: Your Honor, at this time I would like to move the admission of the substituted second page of Exhibit 3, including the figures below the bottom line.

The Court: Those are the only parts of the exhibit that the Court will receive, in line with its previous ruling. In other words, lines 12 and 13 will not be received.

[fol. 140] I would like you to submit the remaining part of page 2. You might want that for your record. We will just attach it.

Mr. Highsaw: As I understand it, the document actually being offered has these corrections, line 15 and the figure on the net, have been made on the document itself.

The Court: Oh, I see, it has been. I see it has been now, but you may want the other figure for your record. That's what I had in mine.

Mr. Cummings: Good.

Mr. Highsaw: Well, I have no objection to the receipt of the document with the penciled-in corrections.

The Court: All right, thank you.

Mr. Cummings: At this time, I would also like to move the admission in evidence of Exhibits 1 and 2, which are in the Court file because they were presented at the pretrial before Judge Doyle.

Number 1 is the Trainmen's strike letter of May 16, 1960, and Number 2 is the Mediation Board Secretary Thompson's wire of April 19, 1960.

The Court: Do you have any objection?

Mr. Highsaw: No objection.

The Court: 1 and 2 will be received.

(Plaintiff's Exhibits 1 and 2 for identification were received in evidence.)

Mr. Cummings: And as a final exhibit we would like to offer in evidence the deposition that was taken of Mr. Speight, which has been marked for identification as Plaintiff's Exhibit 10, with the understanding that the Rio Grande is not claiming any damage for so-called loss of business from the General Electric Company.

I believe this was one of the depositions you said you were planning to offer in evidence, Mr. Highsaw.

[fol. 141] The Court: I have the deposition here.

Mr. Highsaw: Your Honor, I only have objections to certain lines. I have no objection to the general offer. I do have objection to certain specific lines in it, and I would like to record those objections at this time for your subsequent examination.

The Court: All right, Mr. Highsaw. If it would be more convenient, we could do this after lunch.

Mr. Highsaw: Yes, I think it might be better and will save Your Honor's time if I do this.

The Court: All right. Do you have any further testimony from Mr. Darnell?

Mr. Barrows: Yes, he will have to come back this afternoon.

The Court: Yes, I mean at this time.

Mr. Cummings: No.

The Court: All right, you may step down, Mr. Darnell, and you will return.

Do you have any witness you want to put on before lunch?

Mr. Cummings: No, there is no other witness. We will be asking Mr. Darnell a few questions after lunch.

The Court: All right, then we will recess until 1:30.

(Whereupon, the Court recessed at 11:50 o'clock a.m., and reconvened at 1:30 o'clock p.m.)

Mr. Barrows: Let the record show that I have furnished Mr. Highsaw a copy of the annual report of the Denver

and Rio Grande Western Railroad Company for the year 1960.

Mr. Highsaw: That's correct, Your Honor.

The Court: All right.

[fol. 142] Mr. Highsaw: Your Honor, I believe when we recessed at noon that I had just said that I had no objection to the admission in evidence of the Speight deposition except for certain specific portions thereof which I move be stricken.

The portions are as follows: Beginning with line 15 on page 8, running through line 7 on page 31, and I would move to strike that on the grounds that it is a discussion of shipments by General Electric Company, and I understand the claim with respect to General Electric Company is abandoned, so that would be irrelevant.

Mr. Cummings: That is true, Your Honor. We have abandoned any claims with respect to General Electric.

The Court: All right, the objection will be sustained as to that, commencing with line 15 on page 8 and ending with line 7, page 31.

Mr. Highsaw: And the next item, Your Honor, is on line 23 on page 37.

Mr. Cummings: Page 37, line 3?

Mr. Highsaw: Line 23, beginning on line 23.

Mr. Barrows: What page was that again?

Mr. Highsaw: 37, beginning with a question there and running down through line 22 on page 38, which is questions and answers with respect to Kennecott Copper Company, and I would move to strike that and not receive that portion of the deposition on the grounds that it constitutes hearsay evidence.

Mr. Cummings: From a casual reading of it, it looks like the information was furnished to Mr. Speight personally, and for the same reasons as this morning, Your Honor, we would wish that it be received.

Mr. Highsaw: Also—

The Court: Just a minute, I think I might as well rule.

[fol. 143] Mr. Highsaw: Yes, Your Honor, I just had one other point I wanted to make about it.

The Court: Well, the objection is sustained. In addition to the reason stated by Mr. Highsaw, I notice in the answers on page 38, starting with line 4, that is that's the question, and the answer, "In other words, this was just an estimate based upon statements made by Kennecott people, is that right, sir?" "Yes, sir." And further on down, "You really didn't make any investigation?" "Not at that time and not since." So, that's sustained.

Mr. Cummings: Where does your objection end?

The Court: Line 22.

Mr. Highsaw: Line 22, yes.

The Court: That's sustained.

Mr. Highsaw: Next point, Your Honor, is line 4 on page 42.

The Court: 42?

Mr. Highsaw: Yes.

The Court: Line 4, all right, sir.

Mr. Highsaw: And running down through line 21 on that page and that's a discussion of possible losses of shipments by the Rubberoid Corporation, and I believe if Your Honor will look at it, this man Hugh Hill appears earlier in the deposition and is one of the traffic representatives of the Denver and Rio Grande. He worked under Mr. Speight, and the substance is Mr. Hill talked with some Harrington people and Mr. Hill told Mr. Speight, who testified to it in the deposition. Our motion to strike that would be on the grounds it is double hearsay.

Mr. Cummings: Lines 18 to 21 seem to be based on Mr. Speight's personal knowledge.

The Court: Well, I don't agree, Mr. Cummings, because he says, "Not other than perhaps a conversation where they called in asking us about a strike. We gave them information we had." He is talking in general terms. He is not talking about what he personally did there.

[fol. 144] The objection to those lines, 4 through 21, on page 42 will be sustained.

Mr. Highsaw: Your Honor, I noticed I cut that a little short. That objection should have included over to line 9 on page 43. I misread it. I had previously made a mark. The portion I objected to ran over to line 9.

The Court: Yes. Well, the ruling will include through line 9 on page 43.

Mr. Highsaw: That's all, Your Honor. I have no objection to the rest.

The Court: All right.

A. L. DARNELL resumed the stand and further testified as follows:

Redirect examination.

By Mr. Cummings:

Q. Showing you Exhibit 3, at least parts of which are in evidence, comparing the figures on the bottom of the second page with the bottom of the third page, could you tell us what the difference is and what the basis of the difference is?

A. Well, the difference is 6.05 percent.

Q. What caused that difference?

A. Well, the reason that the—page 3 I believe you said was the last page, wasn't it?

Q. Yes.

A. That page decreased percentagewise is because that represents only freight expenses, while the previous page includes passenger train expenses. It includes all expenses, freight and passenger.

Q. I think you have it just the opposite.

A. That's right. It is the opposite. Page 3 includes freight and passenger expenses, while the preceding page includes only freight expenses.

Q. In your opinion, as a statistician for the railroad, which figures are more accurate to represent the situation?

A. The figure that excludes passenger expenses.

Mr. Cummings: That's all I have.

[fol. 145] Recross examination.

By Mr. Highsaw:

Q. Looking at page 32 of the document that has been furnished to me, Annual Report, 1960, Denver and Rio Grande Western Railroad Company, I would like for you, Mr. Darnell, to look at the line under May, 1960, under "Maintenance of Way and Structures", and read to the Court the amount given there.

A. The money?

Q. The money. Yes, the money.

A. May, 1960—

Mr. Cummings: Your Honor, should there be any reading from this until it is in evidence?

The Court: Well, are you going to offer it in evidence?

Mr. Highsaw: The whole book? I will if they want it.

The Court: Do you want it?

Mr. Cummings: If you are only going to have small portions read, that's fine.

Mr. Highsaw: Just three or four figures.

The Court: All right.

A. (Continued) May, 1960, Maintenance of Ways and Structures, $834,376.36.

Q. Now, the reason I didn't have you read the percentage figure there, it appeared to me that was a percentage figure in relation to total revenue and freight revenue.

A. That's true.

Q. All right, so we will not read the percentage figure. Then would you read the expense figure for May, 1960, Maintenance of Equipment?

A. $986,172.62.

Q. Okay, and would you read the one covering Transportation?

A. $2,043,493.58.

Q. And would you read into the record, sir, the figure of freight revenues for May, 1960?

A. $5,991,976.78.

Q. I notice that there is included in the operating expenses in this report a figure under "Traffic". What does that include ordinarily?

A. It is our traffic department solicitation, traffic solicitation, traffic management.

Q. Did you include that item in this figure we had here for the expenses of the railroad for the whole year 1960?

A. No, sir.

[fol. 146] Q. How much would that item come to? For the year 1960?

A. In the amount shown here, you mean?

Q. Yes, for the entire year.

A. Well, for the entire year, it came to $2,817,704.69.

Q. What was it for the month of May, 1960?

A. $236,945.14.

Q. Now, Mr. Darnell, in connection with all these figures you have been giving on the railroad's cost and savings during this period, did any savings in wages of employees not working result to the railroad during the strike on the day of May 16, 1960?

A. Not to my knowledge.

Q. You don't know of any such?

A. I don't know.

Q. Do you know whether or not employees did subsequently attempt to claim wages and these were denied?

A. I do not.

Mr. Highsaw: Thank you, sir, that's all.

Further redirect examination.

By Mr. Cummings:

Q. The items shown on the last page of Exhibit 3 reading, "Transportation, 32.14 percent", would, of course, include labor charges, would it not?

A. Includes labor, yes, sir, crew wages.

Q. So if there had been any savings in labor charges due to the strike, they would be reflected there?

A. Yes, they would be there.

Q. Now, if you applied the percentage that Mr. Highsaw thinks should be applied, namely including passenger business, for the month of May, 1960, what percentage would you come up with instead of 42.38 percent as shown on the third page of Exhibit 3?

Mr. Highsaw: I don't mind him giving the figure. I object to the form of the question. Passenger revenues. I don't think I have insisted.

Mr. Cummings: Well, you argued this morning they should be taken into account.

The Court: Well, I think the question should be without regard to Mr. Highsaw.

Mr. Cummings: Very well, let me strike that reference then.

The Court: All right.

[fol. 147] By Mr. Cummings:

Q. Including passengers, what percentage would you come up for May of 1960?

A. 60.45 percent, and the balance over and above that, of course, would be 39.55.

Q. So, the balance instead of 42.33 percent would be 39.55 percent, is that true?

A. That's what it works out to, yes, sir.

Q. And the total would be 60.45 percent instead of 57.67 percent?

A. That's right.

Further cross examination.

By Mr. Highsaw:

Q. And that leaves out of account the traffic item which you and I just covered, is that correct?

A. Yes, sir.

The Court: Would the 39.55 be in place of 42.33? Is that right?

Mr. Cummings: I couldn't hear the question.

The Court: I probably better direct it to the witness. Would the 39.55—

The Witness: That would be in place of the 42.33, yes, sir.

The Court: All right, I just wanted to understand it. Now, I would like to ask this witness another question. Why isn't the traffic expense which was read into the record figured in the overall expense?

The Witness: Because it is not variable with traffic. It is a sort of a fixed expense. It levels off throughout the year. If we lose 100 cars of freight, our traffic department expense is not going to decrease.

Further redirect examination.

By Mr. Cummings:

Q. In other words, it is your position, is it not, that all the carrier saved during this strike was the cost of transporting the cars in question?

A. The cost of transporting the cars in question.

The Court: Well, I just wanted to know. Thank you.

[fol. 148] By Mr. Cummings:

Q. Speaking of May, 1960, would the maintenance of way figure be higher in that month than throughout the year?

A. It tends to creep up that time of year because the weather conditions permit the work on track and maintenance of track and maintenance of way and structures.

Q. In order to get an overall picture without reflecting seasonal changes, that is why you chose the whole year instead of the month of May?

A. Yes, sir.

The Court: Anything further?

Mr. Highsaw: That's all the questions I have.

The Court: You are excused, Mr. Darnell.

Mr. Cummings: There was one topic I neglected to cover with Mr. Burnaugh after looking at my notes, so with Your Honor's indulgence I would like to recall him to the stand.

The Court: Yes, you may.

Mr. Cummings: Mr. Burnaugh.

H. F. BURNAUGH having been previously sworn, called as a witness by the plaintiff, resumed the stand and further testified as follows:

Direct examination.

By Mr. Cummings:

Q. In connection with your duties at the traffic department of the Denver and Rio Grande, Mr. Burnaugh, have you had occasion to learn shippers' attitude about preliminary injunctions?

Mr. Highsaw: I object to that question, Your Honor.

By Mr. Cummings:

Q. Have you had any conversations with any shippers—I withdraw the question.

The Court: All right.

By Mr. Cummings:

Q. Have you had any conversation with shippers in which you were told that the shippers would insist on preliminary injunctions before dealing with you?

[fol. 149] Mr. Highsaw: Your Honor, I object on the grounds that the Ford Motor Company, which is the one

shipper that has been here and testified, and my recollection is that Mr. Crawford testified very specifically on this as far as Ford, and that's one basis of objection, and, secondly, this is hearsay evidence.

The Court: Is your question limited to this particular strike that we are concerned with here?

Mr. Cummings: Yes.

The Court: The objection is overruled. You may answer the question.

A. Only in the case of Ford Motor Company was I questioned about the temporary restraining order and which apparently they were not familiar compared to an injunction.

Q. During the course of your conversations with Ford, did you or did you not learn that they preferred a preliminary injunction to a temporary restraining order?

Mr. Highsaw: Your Honor, I object on the grounds that was testified to by Mr. Crawford.

The Court: Objection sustained.

Mr. Cummings: Your Honor, apparently Mr. Highsaw takes the position that a temporary restraining order should have been enough to satisfy shippers and I would like to elicit from this witness that shippers instead insist on preliminary injunctions, so I would like at least to offer proof to this effect.

The Court: Well, it seems to me the best evidence to this as far as the Ford Motor Company is concerned is the evidence that Mr. Crawford gave, and as I understood his testimony, the reason that they diverted this traffic was not only the question of preliminary injunction but it was the threat of a strike, and they made a judgment based on I suppose past experience and their business knowledge that it would be prudent to divert this, and so I can't see, unless you can tie it down to some individual at Ford Motor Company—I don't think it is proper testimony to just say that the Ford Motor Company, somebody there, said this, because there is no way to meet that kind of statement.

[fol. 150] By Mr. Cummings:

Q. Very well, was there an individual at Ford Motor Company that told you preliminary injunctions were preferred by Ford?

A. Yes, Dan McCown told me that in my discussion with him and we were deprived of the business until we received an injunction—

Mr. Highsaw: I object to that last part of the answer.

The Court: The last part of the answer will be stricken from the record. It is not responsive to the question and is voluntary.

Mr. Cummings: That's all I have.

Cross examination.

By Mr. Highsaw:

Q. Just for the record, Mr. McCown is the manager of the Ford Motor Company plant at—

A. Milpitas, California.

Mr. Highsaw: Thank you, sir.

The Court: All right, you may step down, Mr. Burnaugh. Thank you.

Mr. Cummings: Because of the argument that was made concerning the answers to interrogatories, three sets of interrogatories that the Rio Grande furnished to the Brotherhood of Railroad Trainmen in this case, I would like them to be marked as a Collective Exhibit 11, and offer them in evidence, Your Honor.

Mr. Highsaw: I think you ought to offer in evidence only the portions I referred to. I didn't cover the entire interrogatories, and I think we ought to offer in evidence only the specific questions and the answers to those specific questions.

Mr. Cummings: Well, I would like to offer the complete answers.

Mr. Highsaw: Because the rest of it is a certain amount of self-serving declarations, Your Honor, on other matters.

The Court: Well, I presume we will just have to screen them, gentlemen, so get your interrogatories out.

[fol. 151] Mr. Highsaw: Well, I referred, Your Honor, to Questions 20, 21—

Mr. Cummings: Rather than delay the proceedings further, we will accept Mr. Highsaw's suggestion and limit it to that portion which he referred to.

Mr. Highsaw: I referred to Questions 20, 21 and 22 of the original, first interrogatories of the Brotherhood and the answers thereto.

The Court: Well, just a moment, gentlemen, so that I may be able to follow you. You gentlemen are much more familiar with the pleadings in this case than I.

Mr. Cummings: That's the portion of the answers where the carrier first gave this percentage.

The Court: Well, I want to get the proper answers here. We have several right in a row. I have answers filed June 22nd. Are we referring to those?

Mr. Highsaw: Yes, that was the third set of interrogatories, and part of it does refer to those, Your Honor. I will get that out in just a minute.

The Court: Are those the ones we are concerned with?

Mr. Highsaw: We are concerned about two, and that is one of them. Now, we are concerned there about the ones that were filed on June 22 with the answers to Questions 12 through 20 and Questions 12 through 20.

The Court: All right, 12 through 20 then of the questions and answers to the third set of interrogatories submitted by the defendant to plaintiff will be received in evidence, the answers being those filed June 22, 1964, in this Court.

Mr. Highsaw: And the other reference that I made, Your Honor, was to the first set of interrogatories which were answered by the plaintiff on January 27, 1964.

The Court: I have some filed here, plaintiff's answers to defendant's interrogatories, filed February 14th.

[fol. 152] Mr. Highsaw: That's undoubtedly the correct ones.

Mr. Cummings: Is the first answer, Your Honor, "Messrs. Carroll and McDonald"?

The Court: Yes.

Mr. Cummings: That's the set, and the exhibit there.

Mr. Highsaw: That's right, Exhibit A. That would be Questions 20, 21 and 22, and the attached Exhibit A, and, of course, the corresponding questions.

The Court: All right, the questions, 20, 21 and 22, submitted by the defendant to plaintiff and plaintiff's answers to those, together with Exhibit A, filed on February 14, 1964, will be received in evidence.

Mr. Cummings: As I recall the argument, Your Honor, this morning, and I may be wrong, there was no reference to the plaintiff's third set of answers.

Mr. Highsaw: No, that is not correct. I started out and I was covering—I covered this and then I had just started in to refer to the annual reports and there was then a colloquy with the Court and I mentioned this third set, but that was what—the third set basically was what it was based on, and we had to start out with the first set in order to understand it.

The Court: Are there any other of the interrogatories you want to offer?

Mr. Cummings: We have nothing further, Your Honor.

The Court: All right, then the plaintiff rests.

Mr. Highsaw: I would like, for the defendant, Your Honor, to ask the plaintiff to stipulate to the questions and answers in Paragraphs 6, 7, 12 and 13 of the original interrogatories that defendant served on the plaintiff and were answered on February 14, 1964.

Mr. Cummings: That's agreeable.

[fol. 153] The Court: All right.

Mr. Highsaw: Secondly, I would like to ask the plaintiff to stipulate into the record a document which I will offer to be identified as exhibits, which are wage claims filed by employees of the Denver and Rio Grande on May

16, 1960, and some of these claims are granted and some denied.

I am offering them for the purpose of showing that the railroad did not pay all its employees on May 16, 1960.

Mr. Cummings: We are not sure that's a complete set, but we will certainly stipulate that some of the claims were denied and some were paid.

Mr. Highsaw: If they will stipulate that, I don't think there is any necessity of putting the actual physical pieces of paper in.

The Court: Now, that's for May 16th?

Mr. Cummings: Yes.

The Court: It certainly wasn't for all the employees of the railroad.

Mr. Cummings: Just the third shift.

Mr. Highsaw: That's right, just during the actual time the strike was going on.

Mr. Cummings: And only employees represented by Mr. Highsaw.

Mr. Barrows: These are switchmen?

Mr. Highsaw: Yes.

Mr. Barrows: Now, how many switchmen claims do you have there, Mr. Highsaw?

Mr. Highsaw: Let's see, I have— (Counting). Assuming I counted correctly, Mr. Barrows, I have 42.

[fol. 154] Mr. Barrows: How many were paid, do you know?

Mr. Highsaw: Yes, I can tell you that, just a moment. If I counted correctly, Mr. Barrows, these are the ones that were sustained, and they come to 22.

Mr. Barrows: 22 out of 42?

Mr. Highsaw: That's right.

The Court: Do you want to cross-examine him, Mr. Barrows?

Mr. Barrows: I don't really see the materiality of switchmen.

Mr. Highsaw: I will state to the Court the purpose of this. The purpose of this, Your Honor, is that it is our

position that the burden of proof is on the plaintiff in this case to show what its net loss was, and it is obvious from these claims alone that there were employees on the railroad who were not paid during this time.

Now, ordinarily, one would assume that when people were not working they wouldn't be paid. We tried to get this through interrogatories and the carrier said they didn't have the information to furnish it to us, and I think Mr. Cummings will agree with me that the line drawn sustaining these claims was that where the carrier called a man for work during this period of time they had to pay him whether he worked or not, but if he was just around on his own or on the picket line he was not paid during this period of time, so it is our position that having shown that there were people who didn't get paid it is a burden of proof on the carrier to show exactly what this amounted to and otherwise they haven't sustained their burden of proof.

Mr. Cummings: We think they are insignificant because Mr. Darnell said his figures did take into account the differences in labor charges because of the strike, but I am certainly not going to quarrel with Mr. Highsaw that those are the actual statistics on the switchmen's claims, and we will stipulate to that effect.

[fol. 155] Mr. Highsaw: I think that concludes our presentation.

The Court: All right, defendant rests. I presume there will be no rebuttal?

Mr. Cummings: No.

The Court: Do you gentlemen want to argue it or submit it without argument?

Mr. Highsaw: I think both Mr. Cummings and I are just a little weary. We were discussing it at noon. If it is all right, I would like about the 20 days provided in the other case to submit maybe a short supplemental brief after I have looked over all these figures and perhaps some proposed findings.

Mr. Cummings: If we could have 15 days to reply, that ought to be satisfactory, Your Honor.

The Court: All right, and will you prepare proposed findings, Mr. Cummings?

Mr. Cummings: Surely. The main point we want to brief, and the only point we see that might be briefed is our position that this being a tort case they are not entitled to set off any subsequent recoveries we have made from third parties.

The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.

Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.

Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—

Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not having named these people in the complaint they had properly stated a class action, but now we have had in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike other than the Brotherhood and Mr. Carroll, and when I send in my supplemental brief [fol. 156] that is one point I would make, is that the complaint should be dismissed as to all other defendants.

Mr. Cummings: The same point was made to Judge Phillips, but we will be glad to put that on my brief, too.

The Court: I am not making a judgment or ruling on it. This is just a matter—

Mr. Cummings: The cases we submitted to Judge Phillips hold it is proper to add individual employees as a means of enforcing judgments against unions, but I will put those in our brief.

The Court: All right, now I will see if there is anything else I need.

Apparently we are not going to argue this, so I will ask counsel to meet with my Clerk after I recess and satisfy

yourselves that the exhibits that have been offered are all here and not in your brief cases, inadvertently, of course.

There was a question in my mind about this Exhibit 3.

Mr. Cummings: It is the third page that Your Honor admitted into evidence this morning instead of the second page.

The Court: Well, now, does the third page take into consideration the 62 carloads that were shipped from California east?

Mr. Cummings: Yes, even the first page does, because Mr. McCown's deposition, which is in evidence—

The Court: Yes, I know what the testimony is now since the deposition is in, but I wasn't sure that the figures included that.

Mr. Highsaw: Yes, it does, Your Honor.

Mr. Cummings: Yes.

The Court: All right. Well, do either counsel have anything further then that they want to raise at this time?

[fol. 157] All right, then we will consider the matter submitted. As I understand it, the defendant wants 20 days in which to supplement his trial memorandum and submit proposed findings, and the plaintiff will have 15 days thereafter to submit his reply brief or answer brief.

All right, Mr. Carpenter, if you will take these and then counsel will go over them with you there and see that we have everything we should have.

Court is in recess.

(Whereupon, the hearing was adjourned.)

Filed April 20, 1965.

PLAINTIFF'S EXHIBIT 1

Copy

720 Kittredge Building
Denver 2, Colorado
May 16, 1960

Mr. L. H. Hale, Vice President-General Manager
Denver and Rio Grande Western Railroad Company
1531 Stout Street
Denver 2, Colorado

Dear Sir: Referring to exchange of correspondence between the undersigned and Director of Personnel E. B. Herdman relative to Carrier's refusal to make effective Orders issued by the First Division of the National Railroad Adjustment Board, in connection with their Awards 19 372 and 19 389.

In view of the Carrier's refusal to make effective the Orders of the Board in the above Awards, a legal strike of brakemen on the property was set for 2:30 P.M., April 15, 1960. However, the National Mediation Board assumed jurisdiction in the matter April 13 and the strike was postponed pending mediation proceedings.

The Mediation Board advises this date that their mediation efforts having failed the Board has closed its file on Case E-226. Therefore, you are hereby advised that the strike of brakemen is reset for 2:00 P.M., May 16, 1960, involving the following matters:

[fol. 158]

1. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 372 with respect to payment of money due employees.

2. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 389 with respect to payment of money due employees.

3. Carrier's refusal to comply with Order of the National Railroad Adjustment Board, First Division, to make effective Award 19 372 with respect to reestablishing the tabulated Provo-Eureka run as per the Findings and Award.

Yours truly,

(sgd) R. H. McDONALD
R. H. McDonald
Vice President, BofRT

(sgd) R. E. CARROLL
R. E. Carroll, General
Chairman BofRT

cc: Mr. W. P. Kennedy
National Mediation Board

Copy PLAINTIFF'S EXHIBIT 2

S WA028 DL AR-FAX Washington DC 12 1019 AME

E B Herdman, DIR PERS The Denver And Rio Grande Western Railroad CO DVR;

Following Wire Received From President Kennedy of BRT "Account Failure Management D&RGW Railroad To Apply NRAB First Division Awards 19372 and 19389 Have Authorized The Men We Represent That Property Withdrawn From Service 2:30 PM Mountain Standard Time April 15 1960." Please Wire Statement—

E. C. Thompson Exec Secy NMB—9:24A

D&RGW NRAB 19372 19389 2:30 PM 15 1960.

[fol. 158-A] Clerk's Certificate (omitted in printing).

[fol. 159]

OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

JULY TERM—1966

No. 8196

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Appellee.

Appeal From the United States District Court for the District of Colorado

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OPINION—September 21, 1966

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein, and Mulholland, Hickey & Lyman on the brief) for Appellants.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere, and Sidley, Austin, Burgess & Smith on the brief) for Appellee.

Before Murrah, Chief Judge, Pickett and Lewis, Circuit Judges.

Pickett, Circuit Judge.

[fol. 160] Seeking damages alleged to have resulted from an unlawful strike, the Denver & Rio Grande Western Rail-

[File endorsement omitted]

road Company, a Delaware corporation with its principal place of business in Denver, Colorado, brought this tort action against the Brotherhood of Railroad Trainmen,[1] the chairmen of the Brotherhood of Railroad Trainmen locals in Colorado, and R. E. Carroll, representing the Brotherhood on the Rio Grande as Chairman of the General Grievance Committee. The trial court overruled the Brotherhood's motion to dismiss, which included an allegation that venue of the action did not lie in the United States District Court for the District of Colorado. Following a trial, the local chairmen were dismissed from the action, and judgment in the sum of $37,988.37 was entered against the Brotherhood and Carroll. This appeal followed.

The National Railroad Adjustment Board made two awards for the payment of money to the Brotherhood, which the Railroad refused to pay. On May 16, 1960, at 2:00 P.M., a strike was called on the property of the Rio Grande for the purpose of compelling payment of the awards. At about 6:30 P.M. on the same day, a temporary restraining order enjoining continuance of the strike was served upon Carroll. A few hours later the strike was discontinued over [fol. 161] the entire system and never renewed. Thereafter, holding the strike to be illegal, the district court issued a preliminary injunction which became permanent on July 27, 1960. (185 F.Supp. 369, aff'd 294 F.2d 266). Meanwhile, believing that a strike threat still existed, several shippers, principally Ford and its suppliers, between May 19th and June 1, 1960, diverted freight shipments from Rio Grande lines. It is for the loss of revenue caused by these diversions that the district court allowed recovery.

At the outset, we are confronted with the contention that venue of the action does not lie in the United States District Court for the District of Colorado. The venue statute, 28 U.S.C. §1391(b), states:

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[1] The Brotherhood was the duly certified representative under the Railway Labor Act of certain employees of the Rio Grande, and at all times during this controversy there was in effect a collective bargaining agreement.

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado, or in Cleveland, Ohio, where its headquarters and principal place of business is located. Section 1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and shall be regarded as the residence of such corporation for venue purposes."

Relying upon Rutland Ry. Corp. v. B. of R. T., 2 Cir., 307 F.2d 21, and like authorities holding that incorporated associations, including unincorporated national labor [fol. 162] unions, should be treated as corporations,[2] the district court upheld venue. Subsequent to the entry of judgment, the Supreme Court, in Steelworkers v. Bouligny, Inc., 382 U.S. 145, while recognizing the validity of the reasoning in cases like Rutland, held that an unincorporated labor union was not yet in the same category as a corporation, and that if such unions were to be treated as corporations, the change should be made by Congress and not by judicial determination. Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue. For

[2] The rule is stated in the Rutland case as follows: "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

venue purposes, the Brotherhood is not a resident of Colorado as required by §1391(b), and consequently, the complaint must be dismissed.

The Railroad suggests that even if venue did not exist as to the Brotherhood, the proper procedure would be to drop it from the case and let the judgment stand against Carroll, a Colorado resident. Carroll was Chairman of the General Grievance Committee on the Rio Grande; he was not an officer of the union. So far as the record shows, [fol. 163] Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action.[3]

Reversed.

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—September 21, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

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[3] The trial court found only that Carroll was "General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff" and that he notified the local groups to call off the strike after service of the temporary restraining order.

On consideration whereof, it is ordered by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Brotherhood of Railroad Trainmen and R. E. Carroll appellants, have and recover of and from Denver and Rio Grande Western Railroad Company, appellee, their costs herein and have execution therefor.

[fol. 165]

IN THE UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—
October 24, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[fol. 166] Clerk's Certificate (omitted in printing).

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 794, October Term, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, et al.

ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.